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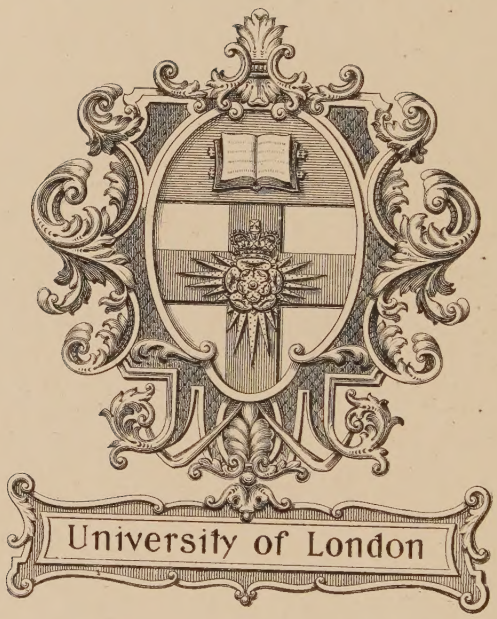

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LAW REPORTS.

Equity Cases,

INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

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ERRATA.

Page	*Line*	*For*	*Read*
164	13	his right to	the debtor's right to the
„	14	he	the creditor.
245 footnote (1)		Law Rep. 2 Ch.	Law Rep. 4 Ch.
429 footnote (1)		2 Beav.	32 Beav.
431	17	Transpose "in *Africa*" to follow "abroad."	

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Equity Cases

BEFORE

THE MASTER OF THE ROLLS,

AND THE

VICE-CHANCELLORS.

BERRIE *v.* HOWITT.

M. R.
1869
Nov. 13.

Solicitor and Client—Charge for Costs—23 & 24 *Vict. c.* 127, *s.* 28.

The charge for costs to which a solicitor is entitled under 23 & 24 Vict. c. 127, s. 28, extends to the property of his own client only, and not to that of other persons.

By a settlement, real estate was assured to the use of *A.* for life, with remainder to his children, as he should by deed or will appoint, and in default of appointment to the use of his children as tenants in common in tail, with cross remainders in tail between them. In a suit to which *B.* was a Defendant, an appointment by *A.* was set aside, so that the property was left to devolve according to the limitations of the settlement in default of appointment, and *B.* became thereby entitled to an estate tail in certain undivided shares of the property. *B.* afterwards died a bachelor, and without having executed a disentailing deed; and the shares to which he was entitled devolved, under the settlement, upon the Plaintiff and two Defendants to the suit as tenants in common in tail:—

Held, that, under these circumstances, *B.'s* solicitor was not entitled to a charge for costs under 23 & 24 Vict. c. 127, s. 28, on *B.'s* shares of the settled property.

BY a settlement made in 1797 certain real estate was assured to the use of *William Howitt* during his life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of his child or children, in such manner as he should by deed or will appoint, with remainder in default of appointment

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to the use of his children as tenants in common in tail, with cross remainders in tail between them.

William Howitt had four children, *John Howitt*, *Enoch Dawson Howitt*, *William Howitt*, and *Sarah Berrie*. He died in 1840, having made a will by which he purported to exercise the power of appointment reserved to him by the settlement of 1797, and also disposed of his own property.

This suit was instituted by *James William Berrie*, the eldest son and heir-at-law of *Sarah Berrie*, against *Enoch Dawson Howitt*, *William Howitt*, *George Enoch Howitt* (the son and heir-at-law of *John Howitt*), and the children of *Sarah Berrie* other than the Plaintiff, for the purpose of having the rights of all parties under the settlement and will ascertained and declared.

A decree was made in the cause by which it was declared that the appointments of the settled real estate in the will of *William Howitt* contained, subsequent to estates given to the testator's children for their respective lives, were void for remoteness; and that the several shares, subject to such life estates, and subject to a certain annuity by the said will given, devolved to the uses declared by the settlement in default of appointment, subject, however, to a declaration as to election and compensation thereinafter contained. Nothing was said in the decree as to costs, the Court being of opinion that each party ought to pay his own.

By virtue of this decree *George Enoch Howitt* became entitled to certain undivided shares of the settled real estates as tenant in tail in possession; and to certain other undivided shares as tenant in tail, subject to the life interest of *Enoch Dawson Howitt*.

On the 17th of June, 1869, *George Enoch Howitt* died, a bachelor and intestate, without having executed a disentailing deed; and thereupon *Enoch Dawson Howitt*, *William Howitt*, and *James William Berrie*, became, by virtue of the decree, entitled to the shares formerly vested in him as tenants in common in tail, in accordance with the limitations of the settlement of 1797.

The solicitor of *George Enoch Howitt* now presented a Petition praying for a declaration that he was entitled to a charge on the shares to which *George Enoch Howitt* was entitled in the settled estates for the amount of his bill of costs incurred in relation to the suit, and that the amount of such bill might be declared to be

a charge on the said shares, under and by virtue of the 28th section of the Act, 23 & 24 Vict. c. 127.

Mr. *Jolliffe*, for the Petition:—

By the decree in this suit, the shares of *George Enoch Howitt* in the property were preserved. The decree set aside an appointment by *William Howitt*, which would have deprived *George Enoch Howitt* of all interest, and made a declaration of the rights of all parties. Consequently, the solicitor is entitled to a lien on the shares: *Scholefield* v. *Lockwood* (1). The property on which the lien is declared need not be the property of the client of the solicitor claiming the lien; all that is necessary is, that the property should be preserved in the suit: *Bailey* v. *Birchall* (2).

Mr. *Ware*, for the Plaintiff:—

The interest of the Petitioners' client is determined, and the Petitioner seeks to charge other persons with his costs. That would be contrary to the decree; the Court determined that each party should pay his own costs. *Bailey* v. *Birchall* was a very different case, the suit was an administration suit, in which property was recovered for the benefit of all parties. *Scholefield* v. *Lockwood* is in my favour, for your Lordship expressly says, "If there is anything coming out of the estate to the bankrupt, and that has been preserved by the solicitor, he is entitled to his lien. If there is nothing coming to him, the lien will amount to nothing."

Mr. *Rendall*, for some Defendants:—

This is an attempt by the solicitor of one Defendant to make the co-Defendants pay his costs.

Mr. *Method*, for other Defendants, referred to *Lewis* v. *Duncombe* (3); *Field* v. *Moore* (4).

Mr. *Jolliffe*, in reply:—

By the Act, the solicitor is entitled to a charge on the "property recovered and preserved." Now what property was "re-

(1) Law Rep. 7 Eq. 83.
(2) 2 H. & M. 371.
(3) 20 Beav. 398.
(4) 19 Beav. 176; 7 D. M. & G. 691.

M. R. 1869 BERRIE v. HOWITT.

covered or preserved" in this suit? Not only the estate tail of *George Enoch Howitt*, but also the estates tail in remainder of the Plaintiff and the Defendants *Enoch Dawson Howitt* and *William Howitt* in the shares of the settled property to which *George Enoch Howitt* was formerly entitled. The solicitor is, therefore, entitled to a charge not only on his client's estate in these shares of the settled property, but also on the estates in remainder in the same shares.

LORD ROMILLY, M.R.:—

I think there cannot be any charge. What the statute gives is only a charge on the property of the person who employs a solicitor, and that cannot be extended to the property of other persons who have not employed the solicitor. Here there are a number of successive tenants in tail: the first tenant in tail employs a solicitor to defend him in the suit; and that solicitor gets a charge on the estate of his client, but not on the estates in remainder. If the client bars the estate tail, and gets the fee, the solicitor gets a charge on the fee; but if he does not, then the interest of the client is gone, and it is only on his interest that the solicitor has a charge. I think that is the meaning of the Act; though it ought to be construed liberally, it would be a very strong thing to make one man pay another's costs.

The Petition must be dismissed with costs.

Solicitors: Messrs. *Rhodes, Son, & Duffett*: Messrs. *Ware & Westall*; Mr. *Kempster*.

In re MERCHANTS' COMPANY.

HERITAGE'S CASE.

M. R.
1869
Nov. 6.

Company—Contributory—Transfer not executed by Transferee—Non-Acceptance—Registration.

In December, 1865, a company registered a transfer of shares from *A.* to *B.*, which had not been executed by *B.*; and placed *B.*'s name on the list of shareholders. In August, 1866, the Court, on the application of *B.*, made an order directing *B.*'s name to be removed from the register of shareholders on the ground that *B.* had not accepted the shares. The company accordingly removed *B.*'s name, but did not restore *A.*'s. Afterwards the company was ordered to be wound up:—

Held, that *A.* was a contributory.

THE *Merchants' Company, Limited*, was formed in or about the month of October, 1865. On the 11th of that month Mr. *Heritage* applied for 100 shares, which were duly allotted to him on the 15th of the same month. Previously to, and in contemplation of, the allotment, Mr. *Heritage* instructed his brokers to sell these shares; and they accordingly sold them in the ordinary way to a firm of jobbers on the *Stock Exchange*. On the first settling-day these jobbers paid the price of the shares to *Heritage's* brokers, and passed the name of *Jameson Alers Hankey* as the purchaser. On the 9th of December, 1865, *Heritage* executed a transfer of these shares to *Hankey*. On the 12th of December the board of directors approved of the transfer, although it had not been executed by *Hankey*; and the transfer was registered in the books of the company, and the shares transferred into *Hankey's* name.

On the 6th of August, 1866, an order was made by the Court of Chancery, on the application of *Hankey*, directing his name to be removed from the register of shareholders on the ground that he had never accepted the shares. *Heritage* was not personally a party to this application, and denied that he had any notice of it: he was, however, a member of the firm of solicitors who appeared for the company on the occasion of the order being made.

In pursuance of this order, the name of *Hankey* was removed

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from the register on the 17th of August, 1866; but the name of *Heritage* was not restored.

On the 6th of November, 1866, an order was made for winding up the company, on a Petition presented on the 13th of October previously.

The official liquidator placed *Heritage's* name on the list of contributories; and this was a summons by *Heritage* that his name might be removed therefrom.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for *Heritage*:—

This is a question entirely between the company and *Heritage*. The creditors have no interest in it, for *Heritage's* name did not appear on the register of shareholders subsequently to December, 1865. That being so, the case is governed by *Sichell's Case* (1), which decides that the register cannot be rectified at the instance of the liquidator of a company which is in default. It was clearly a default on the part of the company to register the transfer to *Hankey*; and though he might be entitled to have his name removed from the register, it by no means follows that the company is entitled to put *Heritage* on, especially when regard is had to the lapse of time and change in position of the company between December, 1865, and August, 1866.

In *In re General Floating Dock Company*, which was before your Lordship on the 26th of January, 1867, your Lordship refused to alter the register at the instance of the liquidator.

Sir *R. Baggallay*, Q.C., and Mr. *Lindley*, for the official liquidator:—

The doctrine contended for by the other side would be most agreeable to shareholders in failing companies: they would only require to get the directors to take their names off the register, and then they could never be made contributories. The true principle is, that a person once a shareholder remains a shareholder until he executes a valid transfer; and the order of August, 1866, which has never been appealed from, is conclusive evidence that the transfer executed by *Heritage* was not a proper one. If *Heritage* be not put on the list of contributories, no one can be: that is

(1) Law Rep. 3 Ch. 119.

to say, the directors have cancelled these shares; but what authority had they to do that?

Sichell's Case (1) was totally different. There, while the company was a going concern, *Sichell* had repeatedly applied to the directors to put his name on the register, and they constantly refused to do so: but the moment the winding-up began the official liquidator put him on the list. But the Court held that this was inequitable, regard being had to the acts of the directors, and removed *Sichell's* name from the list. There is no such equity in favour of *Heritage*.

Mr. *Everitt*, in reply:—

All that can be said on the other side is, that the directors have acted wrongfully; that may be a good reason for making them answerable, but none for putting *Heritage* on the list.

LORD ROMILLY, M.R.:—

There is very little difficulty about this case. This is the rule: If shares are once taken properly and *bonâ fide* by a person, those shares remain the shares of the person who took them from the company, and cannot be altered, except either by a forfeiture, in case there should be a forfeiture declared, or by some valid transfer from the person who took them to some other person. Now, the question of forfeiture does not arise in this case. Mr. *Heritage* applied for and got these shares; he directed that they should be sold on the *Stock Exchange*, and they were sold by his broker in the ordinary way. The name of the transferee which was given was that of Mr. *Jameson Alers Hankey*. It appears that Mr. *Jameson Alers Hankey* (at least, so I assume), had given no authority to buy these shares for him. The transfer was taken to the office of the company, and the office, without waiting to see whether Mr. *Hankey* accepted the shares or not, transferred the shares into the name of *Jameson Alers Hankey*. In fact, they trusted the word of the broker that Mr. *Jameson Alers Hankey* had accepted the shares without his having executed the transfer at all, and accordingly transferred the shares from Mr. *Heritage's* name into the name of Mr. *Hankey*. When Mr. *Hankey* first heard of this I do not know; but this was finally done in December, 1865.

(1) Law Rep. 3 Ch. 119.

M. R. 1869 HERITAGE'S CASE.

In August, 1866, Mr. *Hankey* applied to this Court to have his name taken off the list of shareholders, upon the ground that he had never accepted the shares, or that he had never authorized the taking of the shares. Whether rightly or wrongly—and I must assume the order which the Court then made to be right—the Court made an order taking his name off the list of shareholders. The result is, that the shares necessarily reverted to Mr. *Heritage*. It is no doubt a very hard matter for a man not to have got rid of the shares when he has taken every step that depended on him for that purpose; but it necessarily follows that if he has not duly transferred the shares they remain in him. In this case the Court has determined that the alleged transferee was not a transferee, consequently the transfer is worth nothing, and Mr. *Heritage* remains the owner of the shares.

What takes place since is this: The winding-up occurs in October, 1866; and now, three years after that time, I am called upon, not to transfer these shares back again into the name of Mr. *Hankey*, not to put him upon the list of contributories, because that would be impossible as long as there exists an order of this Court taking his name off—which order must be discharged before anything could be done in the matter—but I am asked to strike off the name of Mr. *Heritage*, the result of which would be simply to cancel the shares. I do not find any case in which anything of the kind has ever been done, and I am at a loss to understand on what principle it could be done. The case I was referred to, of the *General Floating Dock Company*, has really nothing to do with the matter. There was, in that case, no doubt, a set of shares sold and transferred into the name of a person called *Hughes;* the transfer was duly made, and then an application was made in the name of the official liquidator that the name of Mr. *Hughes* should be struck off, and that the name of the transferor should be restored. I refused that application: I said, "You cannot interfere in the matter at all; the register as it stands will bind the parties. Unless they take some step in the matter, it is not for you to interfere, merely because you think one man is rich and the other poor, and that, therefore, the rich one is better able to contribute to the assets of the company." I think this case is entirely different, and is quite clear. The Court has determined that no valid transfer was

made from Mr. *Heritage*, and, therefore, Mr. *Heritage* remains the shareholder. His name is, therefore, properly on the list of contributories, and I cannot remove it.

M. R. 1869 HERITAGE'S CASE.

Solicitors for *Heritage:* Messrs. *Evans & Co.*
Solicitor for the Official Liquidator: Mr. *J. Rand Bailey.*

In re SPENCE'S PATENT NON-CONDUCTING COMPOSITION AND CEMENT COMPANY.

M. R. 1869 *Nov.* 13.

Company—Winding-up—Petition—Practice.

The holders of fully paid-up shares in a company presented a Petition praying for the winding up of the company on the ground that its business could not be carried on at a profit. The Petition contained no allegation that the company was insolvent, but evidence was given tending to shew that such was the case:—

Held, that a creditor appearing in support of the Petition could not claim an order on the ground that the company was insolvent where the Petitioners' case failed.

Port 383. 12 Eq 59 6 Ch 816

THIS was a Petition by three holders of fully paid-up shares of *Spence's Patent Non-conducting Composition and Cement Company, Limited*, praying for a compulsory winding up of the company on the ground that its business had always been carried on at a loss, and could not be carried on at a profit.

The Petition did not allege that the company was insolvent, but evidence was given tending to shew that such was the case.

Mr. *Roxburgh*, Q.C., and Mr. *Bond Coxe*, for the Petitioners.

Mr. *Higgins* appeared for a creditor on an unpaid bill of exchange and supported the Petition. He submitted, that as it appeared by the evidence that the company was insolvent, his client was entitled to an order.

LORD ROMILLY, M.R.:—

Mr. *Higgins*' case is what the company have to meet; I should have dismissed the Petition but for that. Ought I not to make an order, and give the conduct to Mr. *Higgins*' client?

M. R. 1869 — *In re* SPENCE'S PATENT NON-CONDUCTING COMPOSITION AND CEMENT COMPANY.

Sir *R. Baggallay*, Q.C. (Mr. *Horton Smith* with him), for the company:—

The company have met the Petitioners' case, and they ought not to be put to meet a fresh case of which they have had no notice. No doubt the Court allows a creditor to come in and support a Petition for winding up a company; but he must support the Petition as it stands, and cannot be allowed to make a fresh case of his own. In the present case the creditor filed his affidavit in support of his claim only yesterday; we have not had a copy of it, and until now we had no notice that such a case was to be brought forward. In the case of *In re Imperial Bank of China, India, and Japan* (1), Lord Justice *Turner* laid down that in these cases the Court cannot proceed upon affidavits as to facts which are not in issue. [He was then stopped.]

LORD ROMILLY, M.R.:—

I am satisfied that it would lead to very serious consequences if I were to accede to Mr. *Higgins*' application. If his client chooses to present a Petition of his own, he will be in a very different position from the present Petitioners; but I cannot allow him to convert a shareholders' into a creditors' Petition upon such short notice, or rather no notice at all. The Petition must be dismissed, and the costs will follow the event.

Solicitors: Mr. *J. Rand Bailey*; Mr. *Sparham*; Messrs. *Powell, Thompson, & Groom.*

(1) Law Rep. 1 Ch. 339.

GRENVILLE-MURRAY *v.* EARL OF CLARENDON.

M. R.
1869
Nov. 12.

Parliamentary Vote—Trust Fund—Jurisdiction—Pleading—Allegation of Trust—Demurrer.

The funds voted by Parliament for the public service are not trust funds in the hands of the Secretaries of State who receive them from the Treasury; and the Court of Chancery has no jurisdiction to take any account of the application of such funds.

A general allegation that a Defendant holds a fund upon trust for the Plaintiff will not protect a bill from demurrer for want of equity. For that purpose the bill must allege facts shewing that the relation of trustee and *cestui que trust* exists between Plaintiff and Defendant.

12 Eq 71
18 Eq 45, 86

DEMURRER.

The bill was by *E. C. Grenville-Murray*, as Plaintiff, against the Earl of *Clarendon*, Her Majesty's Principal Secretary of State for Foreign Affairs, and *James Murray*, the permanent Under-Secretary for the same department, as Defendants. The allegations, so far as material for the purposes of this report, were in substance as follows:—

The Plaintiff was employed at his own cost in the diplomatic service from 1841 until 1851. In the last-mentioned year he was appointed an unpaid *attaché* at *Vienna;* and on the 28th of February, 1852, a commission appointing him *attaché* at *Vienna*, with a salary of £300, was directed to be prepared by the then Secretary of State for Foreign Affairs; but (par. 5), by the influence and at the instigation of the Defendant *James Murray*, this commission was cancelled, and the Plaintiff was transferred from *Vienna* to the less important mission at *Hanover*, at a loss to the Plaintiff of £2000.

In October, 1852, the Plaintiff was appointed a paid *attaché* in *Constantinople*, and in 1853 applied to the ambassador there for active service. Thereupon (par. 7), through the machinations of the Defendant *James Murray*, the Plaintiff was degraded from his position and rank as a paid *attaché* in the diplomatic service, and sent to act as vice-consul at *Mitylene* during the absence of the vice-consul there. By his enforced residence at *Mitylene* the Plaintiff incurred a loss of £500.

M. R. 1869 GRENVILLE-MURRAY v. EARL OF CLARENDON.

in which such sum of £600,000 a year has been disposed of. And the Plaintiff alleges, and it is the fact, that if an account were taken of the manner in which the said sum of £600,000 a year so drawn and paid as aforesaid has been spent in each year, it would be found that the sums of money due to the Plaintiff upon the several accounts hereinbefore mentioned have been retained by the Defendant *James Murray* for his own use and benefit out of the said trust fund or sum of £600,000 a year.

"65. The Plaintiff charges that it is the immemorial custom of the Foreign Office Department of Her Majesty's Government, and there exists a tacit, but well known, understanding between the said department and persons desirous of entering the diplomatic and consular services, and it is, in fact, an agreement between them, that in consideration of such persons serving the Goverment in the said department for a term of seven years at their own costs and charges, and without pay or reward, they shall in due time become permanent civil servants of the State, and be entitled to certain salaries during employment, and to certain pensions during non-employment, and to certain superannuation allowances after service concluded, as a provision for their declining years. And the Plaintiff, relying upon and in faith of such agreement, accepted employment under the Government in the Foreign Office Department in the year 1841, as hereinbefore mentioned, and thenceforward for the space of ten years, until the year 1852, truly and zealously served the Government in such department without emolument, and at his own costs and charges; and the Plaintiff performed and fulfilled his part of the said agreement, and has always done and fulfilled all things necessary and proper to entitle him to have the said agreement performed on the part of the Foreign Office of Her Majesty's Government. Nevertheless, although the Plaintiff has expended all his own private means and fortune in the service of the Government during the ten years aforesaid, and has since the year 1852 faithfully and well served the Government as a permanent and paid servant of the State for the period of sixteen years, and is ready and willing, and hereby offers to continue his said service, and to fulfil the said agreement on his part, yet the Foreign Office have not fulfilled the said agreement on the part of the Government; but Lord *Stanley*, when at the head of

such department, at the instigation of the Defendant *James Murray* unjustly, and without trial, dismissed the Plaintiff from the service of the State and deprived him of the emoluments of his office, and unjustly refused to grant to the Plaintiff an *exequatur* or any certificate of service, so as to deprive the Plaintiff of his claim to a pension from the Government in respect of past services, and by reason of such dismissal the Defendant, the Earl of *Clarendon*, who is now at the head of the Foreign Office Department, refuses to employ the Plaintiff any longer in the said department, or to maintain the Plaintiff in his rank and position in the said service, and to employ the Plaintiff any longer therein, and to pay, or cause to be paid, to the Plaintiff the usual pension whilst unemployed, and to grant to the Plaintiff any certificate for a superannuation allowance; and by reason of such refusal the Plaintiff, after twenty-seven years spent in the service of the State, and having spent all his own private means in such service, is now, without just cause assigned, and for no sufficient reason, dismissed from such employment and deprived of his pension, to the great damage and ruin of the Plaintiff, contrary to equity, and contrary to the rules and customs of the Foreign Office, and to several Acts of Parliament in that behalf made and provided, to which the Plaintiff claims leave to refer."

The bill prayed, first, for a declaration that the Plaintiff had not been lawfully removed from his office of consul-general, and was still entitled to the proper emoluments of such office; secondly, for an account of what was due to the Plaintiff from the Foreign Office Department of Her Majesty's Government in respect of the matters of account in the 5th, 7th, 8th, and 10th paragraphs of this bill in that behalf stated; thirdly, that the moneys which should be found due to the Plaintiff upon such account might be paid to the Plaintiff by the Defendants as such trustees as aforesaid; fourthly, for an account of what was due to the Plaintiff from the Foreign Office in respect of the matters in the 13th and 15th paragraphs of the bill stated; fifthly, that the moneys which should be found due to the Plaintiff upon taking such last-mentioned accounts might be paid to the Plaintiff by the Defendants as such trustees as aforesaid; sixthly, that if it should be found necessary for the proper taking of the several accounts therein prayed for, an

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in which such sum of £600,000 a year has been disposed of. And the Plaintiff alleges, and it is the fact, that if an account were taken of the manner in which the said sum of £600,000 a year so drawn and paid as aforesaid has been spent in each year, it would be found that the sums of money due to the Plaintiff upon the several accounts hereinbefore mentioned have been retained by the Defendant *James Murray* for his own use and benefit out of the said trust fund or sum of £600,000 a year.

"65. The Plaintiff charges that it is the immemorial custom of the Foreign Office Department of Her Majesty's Government, and there exists a tacit, but well known, understanding between the said department and persons desirous of entering the diplomatic and consular services, and it is, in fact, an agreement between them, that in consideration of such persons serving the Goverment in the said department for a term of seven years at their own costs and charges, and without pay or reward, they shall in due time become permanent civil servants of the State, and be entitled to certain salaries during employment, and to certain pensions during non-employment, and to certain superannuation allowances after service concluded, as a provision for their declining years. And the Plaintiff, relying upon and in faith of such agreement, accepted employment under the Government in the Foreign Office Department in the year 1841, as hereinbefore mentioned, and thenceforward for the space of ten years, until the year 1852, truly and zealously served the Government in such department without emolument, and at his own costs and charges; and the Plaintiff performed and fulfilled his part of the said agreement, and has always done and fulfilled all things necessary and proper to entitle him to have the said agreement performed on the part of the Foreign Office of Her Majesty's Government. Nevertheless, although the Plaintiff has expended all his own private means and fortune in the service of the Government during the ten years aforesaid, and has since the year 1852 faithfully and well served the Government as a permanent and paid servant of the State for the period of sixteen years, and is ready and willing, and hereby offers to continue his said service, and to fulfil the said agreement on his part, yet the Foreign Office have not fulfilled the said agreement on the part of the Government; but Lord *Stanley*, when at the head of

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The bill prayed, first, for a declaration that the Plaintiff had not been lawfully removed from his office of consul-general, and was still entitled to the proper emoluments of such office; secondly, for an account of what was due to the Plaintiff from the Foreign Office Department of Her Majesty's Government in respect of the matters of account in the 5th, 7th, 8th, and 10th paragraphs of this bill in that behalf stated; thirdly, that the moneys which should be found due to the Plaintiff upon such account might be paid to the Plaintiff by the Defendants as such trustees as aforesaid; fourthly, for an account of what was due to the Plaintiff from the Foreign Office in respect of the matters in the 13th and 15th paragraphs of the bill stated; fifthly, that the moneys which should be found due to the Plaintiff upon taking such last-mentioned accounts might be paid to the Plaintiff by the Defendants as such trustees as aforesaid; sixthly, that if it should be found necessary for the proper taking of the several accounts therein prayed for, an

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account might be taken of all the moneys drawn from, and paid by, Her Majesty's Treasury to the Foreign Office in trust as in the bill mentioned, since the time in the year 1858 when the Defendant *James Murray* became the permanent Under-Secretary of Foreign Affairs, superintending the financial business of the Foreign Office, down to the filing of the bill, and that the Defendant *James Murray* might be ordered to render an account, and that an account might be taken of how the said moneys or trust funds had been disposed of; seventhly, for an inquiry as to the damage sustained by the Plaintiff by reason of his having been deprived of the emoluments of his office during the time in the bill stated, of his said commission, and of the pension earned by him; and, eighthly, that the amount of such damage might be ordered to be paid to the Plaintiff by the Defendants as such trustees as aforesaid.

Both Defendants demurred for want of equity.

Sir *Roundell Palmer*, Q.C., and Mr. *Wickens*, for the Defendants:—

It may be that the matters complained of by the 5th, 7th, 8th, 10th, 13th, and 15th paragraphs of the bill are proper subjects for a petition of right, but they certainly cannot be the subjects of a suit in equity to which the Attorney-General, as representing the Crown, is not a party. The only pretence of equity in the bill is contained in paragraphs 63 and 63a. It has often been observed that you cannot by filing a bill with charges of fraud give this Court jurisdiction which it would not otherwise have. So neither can you give it jurisdiction by a simple allegation of trust; you must state the facts, deeds, or instruments which give rise to the trust. Here the alleged trust fund is the sum of money annually voted by Parliament for the Foreign Department. This fund is administered by the Executive Government in accordance with Acts of Parliament, the *Appropriation Act*, Audit Acts, and others, of which the Court will take judicial cognizance. To allow such a bill would simply be to allow an appeal from the decision of the executive to this Court, and would impose on the Court the necessity of taking the accounts of all sums annually voted by Parliament for any department of Her Majesty's Government.

Mr. *Southgate*, Q.C., and Mr. *Gill*, for the Plaintiff:—

The question is, whether, upon the allegations of this bill, the Plaintiff has any equity to come into this Court. It seems to be supposed by the Defendants that every claim against the Government must be made by a petition of right, but that is not so. Wherever there is money in the hands of a private individual appropriated to a particular purpose, the rule that the Crown must be sued by a petition of right does not apply: thus a mandamus will lie against the Lords of the Treasury to compel them to pay a sum of money in their hands to a person entitled to it: *Rex* v. *Lords of the Treasury* (1); *Reg.* v. *Lords of the Treasury* (2). The same principle is laid down in *Reg.* v. *Commissioners of Woods and Forests* (3); and in *Ellis* v. *Earl Grey* (4). We allege that the Plaintiff received a commission from the Queen on the terms mentioned in paragraph 65; that this commission has never been lawfully cancelled; and that the Defendants have in their hands moneys voted by Parliament and appropriated for the Plaintiff. These allegations are sufficient to give the Court jurisdiction: *Priddy* v. *Rose* (5); *Hill* v. *Reardon* (6).

LORD ROMILLY, M.R.:—

I am of opinion that this demurrer must be allowed. I think it only necessary to go through the different paragraphs of the prayer of the bill to shew that it is impossible for the Plaintiff to obtain any relief on any of these subjects. But, in the first place, it is proper to observe that in all these cases general allegation will not do for the purpose of supporting a bill against demurrer. It is quite true that the Defendant when he demurs to a bill admits all the statements in the bill to be correct for the purpose of the demurrer, and says: "Admitting all those to be true, on your own shewing you have not made out a case for relief." But that is to be treated with this qualification: that it will not do to allege a thing which does not appear to be the fact upon the circumstances stated in the bill in order to entitle you to that relief.

(1) 4 A. & E. 286, 976.
(2) 16 Q. B. 357.
(3) 15 Ibid. 761.
(4) 6 Sim. 214.
(5) 3 Mer. 86.
(6) Jac. 84.

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Frietas v. *Dos Santos* (1) is a case of that description. There a man filed a bill making out a case for a large sum of money to be due to him from the Defendant, and then he charged generally that there were mutual accounts between them which could not be taken at law; whereupon it was argued that there being an allegation, admitted to be true, that there were mutual accounts which could not be taken at law, the demurrer could not be allowed, a case being made for equity. But Sir *William Alexander*, Chief Baron, who had very great knowledge of equity, held that to be a mere general statement, in order to try to get over the facts of the case. That the Plaintiff ought to state what these general and mutual accounts were. He had only stated one side of the account, which was fit for an action at law, and not a case for a suit in equity. To apply the principle of that case to the present, it will not do for a Plaintiff to say that *A. B.* has got a trust fund in trust for me, and that, accordingly, this Court has jurisdiction in the case, unless the allegations in the bill shew that the facts are such as to create the relation of trustee and *cestui que trust* between the parties. If this were not so, the advantages to be obtained from a demurrer, which are considerable, inasmuch as it often determines the rights of the parties at an earlier stage very conveniently, and avoids a great deal of expense, would be wholly frustrated, for an allegation of that description, which the draftsman would always put in, would prevent a demurrer from ever being allowed to any bill. Accordingly, it has always been considered by the Court that you must look at the facts as stated in the bill, and that the mere general allegation of a trust, or that there are mutual accounts, will not add a different quality or feature to the facts already stated, so as to give this Court a jurisdiction which it would not have upon the statement of facts contained in the bill. Having made that observation, I will proceed now to go through every paragraph of the prayer of the bill.

I have not read, and I do not consider it to be necessary to go into, the exact details of the complaints made against the Plaintiff, and his defence to them, because, whether the defence he makes exonerates him, whether it shews that the Foreign Office has acted with harshness in this case or not, is not a matter which I have

(1) 1 Y. & J. 574.

anything to do with. It may be that it is an extremely hard case, and that they have dealt with great harshness with the Plaintiff in depriving him of his situation, and of his allowance, and of his ordinary retiring pension; but these facts I cannot go into. The first paragraph of the prayer of the bill is this:—That it may be declared that he has not been lawfully removed from his office, and is still entitled to the proper emoluments of the office. It appears that the present Lord *Derby*, when he was Secretary of State in the Foreign Office, thought fit, upon statements made to him, and upon an investigation directed by him, to remove this gentleman from his office. That is all that appears. What is there unlawful or illegal in that? Unquestionably, if he had been appointed to an office by Act of Parliament, or by patent from the Crown, which was to be held as long as he behaved himself properly, then I might have to go into the fact of whether the removal of this gentleman was justified—whether the acts proved to have been done by this gentleman were such as warranted his removal. But there is nothing of the sort upon the facts of this case; neither is it a Parliamentary office, nor is it an office created by patent, but it is simply an office held during the goodwill and pleasure of the Sovereign; that is, the goodwill and pleasure of the Sovereign as expressed by Her Majesty's Secretary of State in the department to which he belonged, and in that respect, and in no other respect, differing from that of any clerk in any of the offices of the Government. The Secretary of State for Foreign Affairs thought fit to remove him. It is impossible that any Court of Equity can go into that question. If he has been personally wronged or personally injured by the Secretary of State for Foreign Affairs, or any other gentleman, he may have an action personally against him; but about that I express no opinion. That is not a question which could come into a Court of Equity. Therefore it is impossible for me to say that he has been unlawfully removed, and that he is still entitled to the proper emoluments of his office.

The second paragraph of the prayer of the bill is this:—[His Lordship read it, and stated the effect of the 5th, 7th, 8th, and 10th paragraphs of the bill, and continued:—] Those are the claims which he makes in this paragraph—£2000, £500, £150, and £400. Now there is not a single allegation to shew that he is entitled to

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that money. He says that he is, but there is nothing whatever to shew that the Foreign Office have not given him everything which he was entitled to have. Nor is there anything to shew me how the expenses were incurred, or the like, or that he is entitled to any claim in any respect. If he is, it is not by bill in equity that he can enforce his claim; it would be by proceeding at common law; and assuming that he was right, and entitled to have sums of that description paid him, he could not come into a Court of Equity to have those sums simply paid to him.

The next is a subject which I have to a certain extent anticipated. It is the 3rd paragraph of the prayer of the bill. He asks for an account of what is due upon these sums, and supposing that to be made: "That the moneys which shall be found due to the Plaintiff upon all or any or either of the aforesaid particulars or matters of account may be paid to the Plaintiff by the above-named Defendants as such trustees as aforesaid under the order and decree of this honourable Court." Now this is the material point, because if anything can support the bill, it must be upon this part of the case. I will read the paragraphs which relate to this part of the case:—[His Lordship read paragraphs 63 and 63a.] Now there is nothing even in that statement which would cover these four sums of money, for these are not salaries or expenses in the way of business of the diplomatic service. But the difficulty, or, rather, the impossibility, of treating it as a trust fund is this—that it is paid for the general purposes of the office. It is not paid in trust for any particular person. The case that was cited was to this effect: that if Parliament votes a sum of £1000 for *John Smith*, and the Treasury devote in their books the payment of that sum to other purposes, then a mandamus will lie to the Treasury to order them to pay that £1000 to *John Smith*. But there is nothing of the sort here. Parliament has merely voted certain sums to Her Majesty, and of these sums £600,000 are to be applied to the Foreign Office. The distribution of that amount is left to the officers of the Foreign Office to apply in such a manner as is most subservient to Her Majesty's service, and to the due support of the Foreign Office, and there is nothing whatever to connect the Plaintiff with a penny of this money in any respect. It is impossible for me, therefore, in that state of things to say that

there is any trust for him. The bill seems to endeavour to make out a case of this description—the money is given to Mr. *James Murray* in trust for all the officers of the department, and if you were to take an account and see what he has paid, there would remain a certain sum which would be applicable to the Plaintiff's salary or to his allowance. I think that is putting it more favourably than it appears in the bill, because you do not find it is even so stated in the bill. But it is obvious that even so put, it could not be gone into, for I should then have to take all the accounts of the Foreign Office, the accounts between the Foreign Office and the Treasury, and inquire how they have performed their duties, and I should be doing what even Parliament has never attempted to do, although it has gone a great way in examining into accounts of this description. I should be obliged to do what in point of fact is expressly asked for on the present occasion, to take an account of what is due, not to the Plaintiff, but of all the moneys drawn and paid by Her Majesty's Treasury to the Foreign Office since the year 1858, when the Defendant, *James Murray*, became the permanent Under-Secretary for Foreign Affairs, superintending the financial business of the Foreign Office, down to the filing of the bill; that is to say, for eleven years. It is only necessary to state the proposition to shew how impossible it is for this Court to take any account of that description, or to have any jurisdiction in the matter. This is clearly not a trust fund in favour of the Plaintiff, and as the duties which the officers of the Foreign Office have to perform are not such that they are accountable to this Court in any respect whatever, it is impossible that this Court can entertain this bill, or give any relief upon it. The other paragraphs of the prayer are merely to the same effect, and do not advance the matter a step further. Therefore I must allow the demurrers with the usual consequences.

Solicitors for the Plaintiff: Messrs. *Cookson, Wainewright, Pennington, & Wainewright.*

Solicitors for the Defendants: Messrs. *Raven & Bradley*, agents for the Solicitor to the Treasury.

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SOLLORY *v.* LEAVER.

Annuity charged on Land—Receiver—Power of Distress—4 Geo. 2, c. 28.

A testator gave an annuity, which he directed to be paid by his son; and, subject to and charged with the payments of his debts and the legacies and annuity thereinbefore mentioned, he devised and bequeathed his real and personal property to his son absolutely. The annuity fell in arrear, after having been regularly paid for twenty years, and the annuitant filed his bill to enforce payment, and moved for a receiver:—

Held, that the annuity being charged upon land, with a power of distress superadded by the statute 4 Geo. 2, c. 28, the Plaintiff had power to help himself, and was not entitled to a receiver.

JOHN SOLLORY made his will, dated the 9th of April, 1824, which contained the following clause:—

"I give and bequeath unto my son, *Thomas Sollory*, for his life, one annuity or clear yearly sum of £36, which I direct shall be paid by my son *James Sollory*, his heirs, executors, or administrators, by four even quarterly payments in the year; the first payment to begin and be made at the end of three calendar months after my decease; and, subject and hereby charged with the payment of my debts (whether due on mortgage or otherwise), funeral, and testamentary expenses, and the legacies or sums of money and annuity hereinbefore mentioned, I give, devise, and bequeath all my messuages, tenements, dwelling-houses, lands, hereditaments, and premises situated in *Bridlesmith Gate* and *Byard Lane*, or elsewhere in the town of *Nottingham*, with their and every of their rights, members, privileges, and appurtenances, and also all my household furniture, book, and other debts, due and owing to me at the time of my decease, tools, implements of my trade, and all other my goods, chattels, personal estate, and effects whatsoever, unto my son *James Sollory*, his heirs, executors, administrators, and assigns."

The testator died shortly after making his will, and on his death *James Sollory* took possession of his real and personal property, and he, or those claiming under him, had ever since been in such possession.

James Sollory made his will on the 2nd of September, 1842, and thereby devised and bequeathed the messuages and hereditaments

mentioned in the will of *John Sollory*, with other property, to *Mary Sollory*, a Defendant, and *Joseph Stock* (since deceased) upon the trusts therein mentioned.

James Sollory died in January, 1843, having mortgaged the property in question for £1200, subject to the annuity. Administration, with the will annexed, was granted to *Mary Sinclair* (a Defendant). The annuity had been regularly paid to the Plaintiff down to the 1st of June, 1867, since which time only a few small sums had been received by him, and he filed his bill to enforce payment of the annuity.

A motion was now made for the appointment of a receiver of the estate.

Mr. *A. E. Miller*, in support of the motion:—

There is no question of the Plaintiff's right to the annuity in this case, it having been paid to him for more than twenty years. The annuity is in the form of a legacy to be paid by the testator's son. It is subsequently charged upon the land, but there is no power of distress and entry, and consequently the Plaintiff has no means of enforcing payment except by a bill in this Court. The annuity cannot be regarded as issuing out of land in the strict sense. It was held in *Boyse* v. *Rossborough* (1) that a bill could be maintained by a devisee to establish a will against the testator's heir-at-law, although there might be no trusts to be executed under the will; and in *Francis* v. *Grove* (2), where there was a gift of an annuity to *A.*, which was charged on the freehold and leasehold estate of the testator, and the annuity had been paid for some years, it was held that such payment of the annuity prevented the claim of *A.* from being barred by the *Statute of Limitations;* and it was decided in *Pritchard* v. *Fleetwood* (3) that a trustee of an estate subject to an equitable annuity must submit to a receiver.

The appointment of a receiver is the only means by which the Plaintiff can here recover his annuity. It is merely an annuity in gross, with a general charge upon the personal estate, as well as the freehold estate, of debts and legacies. The annuity would be subject to abatement, the same as the legacies. The Plaintiff has no legal estate in the land, and therefore cannot have a legal power of distress.

(1) Kay, 71. (2) 5 Hare, 39. (3) 1 Mer. 54.

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Mr. *Field*, for the mortgagee of the estate, coincided with the Plaintiff in asking for a receiver.

Mr. *Chitty*, for the Defendant *Mary Sollory*:—

The Plaintiff has the power of recovering his annuity by distress without coming to this Court. The annuity is charged upon the land, and though there is no power of distress in express words, the statute of 4 Geo. 2, c. 28, s. 5, gives that power in such a case. This is a legal rent-charge, with power of distress under the statute.

In *Buttery* v. *Robinson* (1), where there was a devise of lands to *A.* for life, remainder to *B.* in fee, subject to and charged with the payment of an annuity, it was held that this was a charge on land for which the annuitant might distrain. And it was decided in *Buxton* v. *Monkhouse* (2) that a receiver could not be appointed where there was an annuity secured on leaseholds, with a power of of distress.

Mr. *Miller*, in reply.

SIR R. MALINS, V.C.:—

The testator gives an annuity to his son *Thomas Sollory*, which he directs shall be paid by *James Sollory*, and, subject to and charged with the payment of his debts and legacies and the annuity before mentioned, he gives all his freehold and personal property to his son *James* absolutely; the result, therefore, is, that the whole of the real estate is devised subject to the payment of this annuity. The testator died more than twenty-six years ago, and the annuity was regularly paid up to about two years since, when for some reason, not satisfactorily explained, the payment ceased, and the arrears now remain due. The Plaintiff asks for a receiver, and it also appears that a mortgagee of *James Sollory* joins in asking for a receiver of the estate. Now, considering the state of confusion into which the property has got, I believe it would be the best thing for all parties that a receiver should be appointed, but the question is, whether I have power, in administering the doctrines of this Court, to accede to the present motion. It is clearly settled that where an annuity is given charged on land without any power of distress and entry, that is a rent-seck,

(1) 3 Bing. 392. (2) G. Coop. 41.

to which the statute of Geo. 2 applies and gives power of distress. That was decided in the case of *Buttery* v. *Robinson* (1), which I believe has been recognised ever since as an authority. Here there is an annuity charged upon real estate, which is of sufficient value, and there is no power of distress, consequently it is a case in which the statute adds the power, and I am asked by the Plaintiff, who is therefore an annuitant with power of distress, to appoint a receiver. Now, the doctrine of this Court is, that it will not appoint a receiver on the application of those who do not require it. The principle is the same with regard to a first mortgagee, who has the legal estate; if he asks for a receiver, the application will be refused, because he has power to help himself by entering upon the estate and giving notice to the tenants to pay the rent to him, and thus to get into possession. A second mortgagee, having no such remedy, can have a receiver appointed. The question here is, whether I can appoint a receiver upon the application of an annuitant who has the power of helping himself just as much as a first mortgagee has. It appears to me that in principle I have no such power. If the Court were once to recognise any such right I might be called upon to appoint a receiver in every case where an annuity was in arrear, although the annuitant had full power to distrain. This is within the authority of *Buxton* v. *Monkhouse* (2), although in that case there was a power to distrain given by deed; the only difference is, that here the power to distrain is superadded by the statute. A receiver was in the first instance appointed in *Buxton* v. *Monkhouse*, but Lord *Eldon*, upon a motion to discharge the receiver, held that he had been improperly appointed, the Plaintiff *Buxton* having a trustee, with power of entry and distress on the leasehold estates. Therefore, there is the very reason given by Lord *Eldon*, because the trustee had power to distrain. In this case the annuitant has a power of distress vested in himself, and I think the case is analogous, and that the Court will not help those who have power to help themselves. The motion must, therefore, be refused.

Solicitors for the Plaintiff: Messrs. *Duncan & Murton.*
Solicitors for the Defendants: Messrs. *Pritchard & Son.*

(1) 3 Bing. 392. (2) Coop. G. 41.

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LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* GARNETT.

Covenant—Beerhouse.

A covenant not to use a house as "a beerhouse" is not broken by the sale, under a license, of beer by retail to be consumed off the premises.

3 Ch. D. 231.
16 Ch. D. 646
719

THIS was a motion for an injunction to restrain the Defendant from using a house and premises as a beerhouse for the sale of beer or other liquors, or otherwise in contravention of the covenant entered into by the Defendant in March, 1860.

By this covenant, which was contained in the deed by which certain building land at *Wolverton*, in the county of *Bucks*, was conveyed to the Defendant in fee simple by the Plaintiff company, the Defendant covenanted that the land and other hereditaments thereby conveyed, or the buildings to be erected thereon, or any of them, should not be used "as a beerhouse, inn, or public-house, for the sale of spirituous liquors, and that no slaughter-house, candle, hat, or soap manufactory, tanyard, brick-kiln, tinman, blacksmith, or common brewer, or any other trade or business of any description, should be carried on which should or might thereafter be a nuisance or annoyance to the said company, their successors or assigns, or their tenants, or the owners or occupiers for the time being of the neighbouring premises."

The Defendant occupied a house which had been built on the land conveyed to him, and in August, 1869, he took out a license under the *Wine and Beerhouse Act*, 1869 (32 Vict. c. 27) for the sale of beer in casks. He had since applied for and obtained a license for the sale of beer by retail not to be drunk on the premises. The question was, whether the sale of beer by retail under this license amounted to a breach of the Defendant's covenant not to use the premises as a beerhouse.

Mr. *Speed*, and Mr. *Ince*, for the Plaintiffs, in support of the motion, contended that there had been a direct breach of the covenant on the part of the Defendant, as the license to sell beer by retail constituted the place in which it was sold a beer-

house, whether the beer sold was consumed on or off the premises. They referred to the definition of beerhouse given in *Webster's* Dictionary: "A house where malt liquors are sold; an alehouse," and to 11 Geo. 4 & 1 Will. 4, c. 65; 4 & 5 Will. 4, c. 65; 32 Vict. c. 27. *Feilden* v. *Slater* (1) and *Pease* v. *Coats* (2) were also referred to.

The VICE-CHANCELLOR referred to the case of a grocer selling beer in bottle as an agent for *Bass* or *Allsopp*, and also to that of a large brewery like *Barclay & Perkins*, where beer was sold in casks.

It was admitted that neither the grocer's shop nor the brewery could be called a beerhouse.

Mr. *Jones-Bateman*, for the Defendant, contended that there had been no breach of covenant, and referred to *Burn's* Justice, title Alehouse [Ed. 1869]: "A beerhouse or shop is a house in which beer, ale, porter, or cider, or perry is sold by retail to be drunk on the premises." *Pease* v. *Coates* was an authority in favour of the Defendant, as it was there held that the sale of beer by retail not to be drunk on the premises was no breach of covenant against using the premises as "a public-house for the sale of beer, wine, malt liquors, or spirits." He also referred to *Simons* v. *Farren* (3).

Speed, in reply, referred to an earlier edition of *Burn's* Justice (1837), which did not contain the definition relied upon.

SIR W. M. JAMES, V.C.:—

It is conceded that a beerhouse cannot mean a place where beer is sold in any quantities, but that there must be some limitation to the meaning of the word. The question then is, what was the meaning of the parties to the deed, and what was the ordinary meaning of the term "beerhouse" at the time when it was executed (1860). Now, a person minded to ascertain the legal meaning of the word would naturally resort to *Burn's* Justice of the Peace,

(1) Law Rep. 7 Eq. 523. (2) Law Rep. 2 Eq. 686. 12 Jur. N.S. 684.
(3) 1 Bing. N. C. 126.

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which was the book in constant use by magistrates who had to decide upon granting or refusing licenses. In the edition of 1845, current at that time, it was defined as a house in which beer, &c., "is sold by retail to be drunk or consumed on the premises." I think therefore, as things stand, that the motion must be refused. Costs to be costs in the cause.

Solicitors: Mr. *J. Blenkinsop;* Messrs. *Eldred & Andrew.*

V.-C. J. 1869 Nov. 3.

WILSON *v.* FURNESS RAILWAY COMPANY.

Specific Performance—Railway Company—Agreement to make and maintain—Ultrà Vires—Parties—Attorney-General.

In consideration of certain landowners obtaining from the Admiralty a waiver of an obligation imposed upon a railway company by their Act to construct certain works, and upon conveyance of the necessary land by the landowners, the railway company entered into an agreement with them to make a carriage road between certain specified points, and also to make and maintain a wharf for loading and discharging vessels at a specified place, of a stipulated length, and of a suitable and convenient height.

The obligation imposed upon the company by their Act had been waived by the Admiralty; and the land required had been conveyed to the company, who had commenced but had not finished the road, and had not commenced the wharf:—

Held, on demurrer by the company to a bill by the landowners for specific performance of the agreement, 1, that, having obtained the benefit of the agreement by being thereby released from an onerous obligation, and allowed to substitute something more easy of performance, the company would not be allowed to evade the agreement; 2, that the agreement was not *ultrà vires*, and might be enforced against them; and 3, that the Attorney-General was not a necessary party to a suit for specific performance of an agreement entered into with a company by certain persons on their own behalf, and as representing the inhabitants of the district.

Storer v. *Great Western Railway Company* (1) followed.

DEMURRER.

The bill, which prayed specific performance of an agreement by a railway company to make, construct, and complete the road and wharf specified in that agreement and annexed plan, and to do and

(1) 2 Y. & C. Ch. 48.

perform all works and matters necessary for the completion of the road and wharf, contained the following statements:—

By the *Ulverstone and Lancaster Railway Act*, 1851, it was provided that, subject to any waiver or alteration which might be allowed and approved by the Admiralty, the two several viaducts for carrying the railway across the *Kent* and *Leven* estuaries should be so constructed by the company in a certain specified manner and according to the approval of the Admiralty, and that, subject to any waiver or alteration to be allowed and approved as thereinbefore mentioned, the company should construct an opening swing or drawbridge of not less than thirty-six feet clear width, the site and mode of constructing the same to be only in accordance with such approval and direction.

By an agreement of the 25th of June, 1862, between the eight Plaintiffs of the first part, and the company of the second part, after reciting the Act of 1851, and that the viaduct had been, by the partial exercise by the Admiralty of the power of waiver, constructed without an opening bridge, but with preparations for making the opening at a future time, upon certain notice, and that the company were desirous of obtaining a waiver of the obligation to construct the drawbridge, and that the parties of the first part, "on their own behalf, and as representing the inhabitants of *Arnside, Milnthorpe, Kendal,* and places adjoining or near to the viaduct, and who were interested in the question, had hitherto objected to the waiver of the said opening bridge, and that in order to obviate all further differences the company and the parties of the first part, on behalf of themselves and the said inhabitants, had agreed together: 1. If the Admiralty should waive the construction of and the right to require any opening swing or drawbridge in the viaduct, and if *G. E. Wilson* (one of the Plaintiffs) and the other landowners should convey the land required for so much of the road thereinafter agreed to be made as would pass through their respective estates, and also in consideration of the sum of £200 to be contributed and paid to the company towards the expense of the works, the company would at their own expense, and within six months from the date of the waiver and the delivery to them of the land for the purpose (unless prevented by damage done by the tide to the works), make upon the land obtained for

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the purpose a carriage road, sixteen feet wide from *Dixe's* inn, from *Milnthorpe* to the wharf thereinafter mentioned, in the route or direction shewn on the plan thereto annexed, and would also, whenever any accommodation or occupation road crossed the line of road to be made, make road approaches as good as they then were, or as near thereto as circumstances would permit; and would also yearly after the completion of the road pay to the corporation of *Kendal* (who should be bound to shew the application thereof) the sum of £5, to be applied yearly in repairing or improving that part of the road lying within the division of *Hazlestack* (the £5 not to be paid by the company when the £5 of the preceding year should be remaining unexpended in the hands of the corporation); and would also, at the costs of the company, within the same time as provided for the making of the road, make and at all times thereafter maintain upon the seashore or beach a wharf at or near the place shewn on the plan annexed, with proper mooring posts, to be at all times used as a public wharf for loading and discharging of vessels, and which wharf should be sixty feet in length, and of a suitable and convenient height.

The agreement also provided, 2, that after the completion of the road and wharf any difference between the parties as to the sufficiency thereof should be referred to arbitration; and, 3, that any difference between the parties respecting the construction of any article or clause in the agreement, or respecting any matter or thing thereby agreed to be done by the company, should be referred to the arbitration of two persons, one to be appointed by the company, the other by the parties of the first part, with a provision for appointment of an umpire; and also that if any award should find the road or wharf insufficient it should state in what respect it was so, and direct what should be done to make it sufficient; and that every award duly made should be binding upon the parties, and every such submission to arbitration should be made a rule of Court.

It was also provided, 4, that upon completion of the road and wharf *Wilson* and *Wakefield* should pay to the company the sum of £200; and, 5, that the parties of the first part, on behalf of themselves and the inhabitants aforesaid, would forthwith, at the expense of the company, join and concur, and use their best endea-

vours to procure all other necessary parties to join and concur, in making the necessary application to the Admiralty for obtaining the waiver.

The bill proceeded to state as follows: The Admiralty had waived the right to require the construction of any opening swing bridge on the viaduct according to the terms of the agreement. The land required for the purpose of the aforesaid road was duly conveyed according to the terms of the agreement, and was now vested in and in the possession of the company. The company had commenced making the road, but had not completed it according to the terms and provisions of the agreement; it was in a very incomplete condition, and the company had not made or commenced the wharf mentioned in the agreement. The company had from time to time been required to make and complete the road and wharf, but had neglected so to do, though always admitting their liability, and promising to complete the same. In April last the company requested the Plaintiffs to release them from making the wharf, stating that on this condition payment of the £200 would not be required. The Plaintiffs, however, refused, and on the 14th of July last filed their bill against the company for specific performance of the agreement of June, 1862, and for damages.

To this bill the Defendants demurred.

Mr. *Fry*, Q.C., and Mr. *Currey*, in support of the demurrer:—

The agreement is *ultrà vires* the company, there being no power in the Act of the company (which was incorporated for the purpose of making a railway) enabling it to make a wharf. The Court will not decree specific performance of an agreement to construct works and keep them in repair: *Flint* v. *Brandon* (1); *South Wales Railway Company* v. *Wythes* (2). It is not within the jurisdiction of the Court to enforce part only of a contract. Specific performance is only decreed where the matter can be disposed of by an order capable of being enforced at once, and once for all; and the Court will not assume jurisdiction to compel the performance of a continuous duty extending over many years: *Gervais* v. *Edwards* (3); *Blackett* v. *Bates* (4); *Wilson* v. *West Hartlepool*

(1) 8 Ves. 159.
(2) 1 K. & J. 186; 5 D. M. & G. 880.
(3) 2 D. & War. 80.
(4) Law Rep. 1 Ch. 117.

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Railway Company (1); and generally will not interfere to compel specific performance of an agreement unless it can itself execute the whole contract in the terms specifically agreed upon.

[The VICE-CHANCELLOR referred to *Storer* v. *Great Western Railway Company* (2).]

In that case the company had obtained the Plaintiff's land on the faith of a contract on their part to construct an archway or bridge. Here the ground on which the wharf is to be constructed is not shewn to be in the possession of the company, so as to prevent the Plaintiffs from themselves doing the work; and, again, it is not the case of sale of land to the company upon condition that the particular work should be performed by the purchasers. The contract is too vague in its terms for performance by the Court. How is the question of what are "proper mooring posts" to be determined by a Court of Equity? How are the company to get possession of the land on which to construct the wharf, and how is it to be known whether permission can be obtained from the Admiralty?

Again, the agreement (Clause 3) contains a provision for reference to arbitration, and where a domestic tribunal has been provided which has power to determine how the work has to be performed the Court will not interfere until that tribunal has been resorted to: *Shrewsbury and Birmingham Railway Company* v. *Stour Valley Railway Company* (3).

[THE VICE-CHANCELLOR:—The question whether you are bound to perform the agreement was not a question referred to the arbitrator. You admit that you have never made the wharf at all.]

It is not a case of total refusal on the part of the company. There has been partial performance of the agreement, and whether that partial performance is sufficient is essentially a question for the arbitrator within the clause in question. The delay of six years is fatal to the Plaintiffs' claim, even though they are not concluded by the *Statute of Limitations*: *Rolfe* v. *Gregory* (4).

The agreement is by the Plaintiffs on behalf of themselves and

(1) 2 D. J. & S. 475.
(2) 2 Y. & C. Ch. 48.
(3) 2 D. M. & G. 866.
(4) 10 W. R. 711.

all other "inhabitants of *Arnside, Milnthorpe, Kendal,* and places adjoining or near to the viaduct," and therefore the Attorney-General ought to have been made a party to the suit as representing the public. Lastly, there is a want of mutuality in the agreement. The company could not have come here to compel the Plaintiffs to perform their part of the agreement if they had refused to do so; and again, if the corporation of *Kendal* refused to apply the £5 in repairs as stipulated, the company would have no means of being indemnified.

Mr. *Kay,* Q.C., and Mr. *Nalder,* for the Plaintiffs, were not called upon.

SIR W. M. JAMES, V.C.:—

This demurrer must be overruled. With regard to the main point in question, it is entirely governed by *Storer* v. *Great Western Railway Company* (1), and in truth the agreement appears to me to be even stronger than it was in that case. In this case all that is required is, that a road be made—a thing which presents the least possible amount of difficulty of all works required to be constructed—and the company have actually in this case been released with regard to making certain roadways and the like, and they not only got released from that obligation, but they have got the land conveyed to them and vested in them upon which the road is to be made, having taken it for the purposes of the road. It would be monstrous if the company, having got the whole benefit of the agreement, could turn round and say, "This is a sort of thing which the Court finds a difficulty in doing, and will not do." Rather than allow such a gross piece of dishonesty to go unredressed the Court would struggle with any amount of difficulties in order to perform the agreement. I can easily conceive if there were a difficulty about the statutory power that the Court might see its way by ordering the company to permit the Plaintiffs to do these works at the expense of the company, because the company have got the land, and the Court might say, "You must allow the Plaintiff to do so, but you must pay all the costs that the Plaintiffs have been put to." It appears to me that such a decree as

(1) 2 Y. & C. Ch. 48.

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13 Eq 52

that made in *Storer* v. *Great Western Railway Company* (1) might be very well made on this bill, and that every circumstance that induced the Court to direct specific performance there exists here more strongly than in that case. It is suggested that this will be *ultrà vires* the company, because the company was incorporated for the purpose of making a railway, and not a public road. I should be very sorry if such an objection were to prevail, when the thing was done *bonâ fide*. Being under an onerous obligation to give a certain easement to the public, they agree with persons to substitute something which the company must have thought would be less onerous. That being so, I should be very sorry to hold that the company in doing this was entering into an obligation to do something not lawful. No authority has been cited to me, and I am not myself able to understand any principle on which the Court would hold that to be *ultrà vires* the company. Nor do I see how length of time can have anything to do with it. The company has been in possession of the land, and they say, "You have allowed us for six years not to do it, and therefore we shall not do it at all." I do not think that argument ought to prevail.

Then it is suggested that the Attorney-General ought to be here, because this is intended for the good of the public. I do not think the Attorney-General is a necessary party. I make an agreement with a person that I will make a road, and that road will afterwards be used as a public road. The person who makes the agreement with me has a right to call on me to do it. The agreement is not with the public—the agreement is with the individual. The public is no party to it, and I do not think the Attorney-General is a necessary party to the suit. The demurrer must be overruled.

Solicitors: Messrs. *Scott & Co.* for Messrs. *Mosers, Arnold, & Moser, Kendal;* Messrs. *Sharp & Ullithorne.*

(1) 2 Y. & C. Ch. 48.

PRICE *v.* RICKARDS.

V.-C. J.
1869
Dec. 2, 9.

Practice—Motion to dismiss—Creditors' Deed under Bankruptcy Act, 1861.

A registered deed of assignment in trust for creditors, executed by the Plaintiff pending the suit, has the effect of an adjudication in bankruptcy against the Plaintiff, and deprives the Defendant of his right to move to dismiss for want of prosecution: the proper form of motion being, that the trustee of the deed be ordered to take proper supplemental proceedings within a given time, and in default that the bill stand dismissed.

Pickering v. *Cape Town Railway Company* (1) distinguished.

THIS was a motion on behalf of the Defendant, that the Plaintiff's bill might be dismissed for want of prosecution.

The bill was filed in September, 1868.

Notice of motion for a decree had been served on the 23rd of June, 1869; but although the Plaintiff's time for filing affidavits in reply had expired the Plaintiff had not set the motion for a decree down for hearing.

It appeared that on the 13th of September, 1869, the Plaintiff executed a deed of assignment of all his property for the benefit of his creditors, which purported to comply with all the requisites of the 192nd section of the *Bankruptcy Act*, 1861, and was, on the 15th of September, 1869, duly registered pursuant to the provisions of that Act.

Mr. *Amphlett*, Q.C., and Mr. *Deere Salmon*, for the motion, cited General Order of the 22nd of November, 1866, r. 3; *Pickering* v. *Cape Town Railway Company* (1).

Mr. *Decimus Sturges*, for the Plaintiff, in opposition to the motion:—

The motion is misconceived. The deed of assignment operates as a statutory transfer of the debtor's property as if he had been adjudged a bankrupt, and the Plaintiff has therefore no longer any interest in the subject matter of the suit. He cited the *Bankruptcy Act*, 1861, s. 197. The case of *Pickering* v. *Cape Town Railway Company* does not apply, for in that case the deed had

(1) Law Rep. 7 Eq. 224.

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been declared invalid (1). The Defendant should have adopted the course pointed out in *Robinson* v. *Norton* (2).

Mr. *Amphlett*, in reply.

SIR W. M. JAMES, V.C.:—

The deed of assignment not having been set aside, and being duly registered, operates, under the *Bankruptcy Act*, 1861, as a statutory transfer of the property, and divests all the Plaintiff's interest. The motion therefore must be refused; but as the Defendant appears to have been misled by the case of *Pickering* v. *Cape Town Railway Company* (3), my judgment in which does not appear to have been sufficiently carefully guarded, I shall dismiss it without costs as against the Plaintiff, and give leave to amend the notice of motion and serve it upon the trustees of the deed of assignment.

Dec. 9. Mr. *Salmon* now moved that the trustee of the deed of assignment might be ordered within three weeks to take proper supplemental proceedings in this suit for the purpose of prosecuting the same against the Defendant, or, in default, that the bill be dismissed without further order.

Mr. *Dunn* appeared for the trustee of the deed and consented.

The VICE-CHANCELLOR made the order.

Solicitors: Messrs. *Young, Jones, Roberts, & Hale*; Mr. *G. R. Dodd*; Mr. *John Price*.

(1) See *Ex parte Pickering*, Law Rep. 4 Ch. 58.
(2) 10 Beav. 484.
(3) Law Rep. 7 Eq. 224.

CADBURY *v.* SMITH.

M. R.
1869
Nov. 9, 22.

Will—Non-payment of Legacy—Bill by Legatee—Lapse of Time—Statute of Limitations—Admission of Assets by Executor—Trust.

5 Ch 236

The payment of one legacy under a will by executors, not as such but out of their own moneys, is not an admission of assets for the payment of others.

Where one of two executors who were also residuary legatees, had died, a payment by his representatives to the survivor out of the deceased executor's estate, in satisfaction of the surviving executor's claim as such residuary legatee:—

Held, not to be an admission of assets for the payment of the other legacies under the will.

J. W., by his will, gave his real and personal estate to trustees upon trust to convert the same and pay the income to *F. W.* for her life, and after her decease to pay the capital as she should appoint. *F. W.*, by her will, in exercise of her power, appointed the property to her executors (who were also the trustees of the will of *J. W.* and her own residuary legatees) upon trust to pay certain charitable legacies, including £1000 to the Hospital at *B.* This legacy was not paid, and thirty years after the decease of *F. W.* a bill was filed against the surviving executor and the representatives of one who had died, for its payment:—

Held, that, as in the judgment of the Court there had been no admission of assets for the payment of the legacy, and no trust had been created, and no sum set apart for the payment of the legacy, the claim was barred by the *Statute of Limitations*.

THIS was a suit by the trustees of the General Hospital at *Birmingham*, on behalf of themselves and the other governors, to obtain payment from the representatives of *Frances Wade* of a legacy of £1000 bequeathed by her will.

John Wade, by his will, dated the 12th of July, 1832, devised his real and personal estate to *Samuel Smith* (one of the Defendants) and to *Edward Lee* and *Thomas Robinson*, both since deceased, upon trust to sell and convert the same into money, and to invest the proceeds and to pay the income thereof to his mother, *Frances Wade*, and to his sister *F. Wade* the younger, for their joint lives, and to the survivor during her life, and after the death of such survivor to pay and transfer the capital to such persons and for such interests as his mother, *Frances Wade*, should by her will direct or appoint.

John Wade died in 1832, and his mother, *Frances Wade*, by her

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will, dated the 23rd of February, 1833, in exercise of the power given to her by the will of *John Wade*, devised, bequeathed, and appointed all the lands late the property of her son unto the Defendant *Smith*, and the said *Lee* and *Robinson*, to whom she also gave all her own real and personal estate, upon trust to convert the same, and invest the proceeds after the death of her daughter (who died in her lifetime) to pay certain charitable legacies, including £1000 to the General Hospital at *Birmingham*, and £1000 to the Infirmary at *Leeds;* and the testatrix appointed *Smith*, *Lee*, and *Robinson* executors and residuary legatees of her will.

The testatrix *Frances Wade* died in October, 1836, and her will was proved by her executors.

In 1839 *Lee* died, and in 1858 *Robinson* died, having appointed the Defendants *J. B. Greenwood* and *John Greene* his executors.

The present bill was filed in 1866 against *Smith*, *Greenwood*, and *Greene*, as Defendants.

The bill alleged that the Defendant *Robinson* had realized a large part of the said real estate in his lifetime, and that part of the estate of the testatrix was still unadministered; that *Robinson* had, in 1851, paid the legacy of £1000 to the *Leeds* Infirmary, and that by such payment *Robinson* and *Smith* had admitted assets of *Frances Wade* sufficient to pay all the other charitable legacies in full; that the Defendants had refused to pay the legacy of £1000 to the Hospital at *Birmingham*, though, in 1861, *Greenwood* and *Greene* had paid to *Smith* the sum of £700 on account of his share as one of the residuary legatees under the will of the testatrix. It was alleged in justification of the delay in filing the bill, that the Plaintiffs were not aware of the legacy, and did not know of the probate of the will.

The bill charged that the Defendants had admitted assets sufficient to answer the legacy of £1000, and prayed that they might be decreed to pay the same with interest.

The Defendants contended that the claim was barred by the *Statute of Limitations;* that the executors had treated the charitable legacies as void at law, so far as they were payable out of the proceeds of the sale of the real estate; that the payment of £1000 to the *Leeds Infirmary* was made at the request of *Smith* by himself and *Robinson* personally out of their share of the residuary personal

estate; and evidence was adduced to shew that it was to be considered as a gratuity, and was so entered on the books of the Infirmary: they submitted that such payment was no admission of assets for the payment of the other legacies to charitable institutions. The Defendant *Smith* stated that the sum of £700 alleged by the bill to have been paid to him by *Robinson's* executors was as a compromise of a claim made by him against *Robinson's* estate for money received by *Robinson* beyond his share as one of the residuary legatees.

Sir *R. Baggallay*, Q.C., and Mr. *Speed*, for the Plaintiffs:—

The charitable legatee in this case is entitled to have the accounts taken to see whether there are assets available for the payment of the legacy. The defence relied on by the Defendants, that the legacy is barred by lapse of time, cannot be sustained, for there has been a clear admission of assets on the part of the Defendants. In support of this we rely on the fact that another of the charitable legacies bequeathed by the testatrix, namely, that of £1000 to the Infirmary at *Leeds*, was paid by the Defendant *Smith*, and *Robinson* one of the deceased executors, and that *Smith*, in the year 1862, received from the Defendants, *Greenwood* and *Greene*, the sum of £700 in respect of his claims as one of the residuary legatees of the testatrix against the estate of *Robinson*.

Further, the *Statute of Limitations* is no bar to a trust, and here *John Wade* directed his property to be converted and held in trust, after the death of his mother and sister, as his mother should appoint, and she, by her will, appointed £1000 of the property so held in trust to the Hospital at *Birmingham*. This trust not having been performed is still subsisting, and cannot be barred by time.

[They referred to *Brook* v. *Badley* (1), *Middleton* v. *Spicer* (2), and *Attorney-General* v. *Harley* (3).]

Mr. *Jessel*, Q.C., and Mr. *W. W. Karslake*, for the Defendants *Greenwood* and *Greene*, representatives of *Robinson* the deceased executor:—

It is clearly settled that where it is alleged that there has been an admission of assets by an executor, it is competent to the

(1) Law Rep. 3 Ch. 672. (2) 1 Bro. C. C. 201.
(3) 5 Madd. 321.

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executor to explain. Here there has been no admission of assets for the purpose of the payment of this legacy, and there is none such alleged by the bill. The payment relied on by the Plaintiff, which was made by the executors out of their own moneys, amounts to nothing for this purpose, for there can be no admission except by executors acting in that character. The payment of a legacy by an executor on his own responsibility does not bind him to pay all other legacies: *Postlethwaite* v. *Mounsey* (1).

In *Hutton* v. *Rossiter* (2) the payment by an executor of the duty on the residue was held not to be an admission of assets.

The payment of £700 by *Robinson's* representatives to *Smith* on account of his share as residuary legatee under her will was no admission of assets for the payment of this legacy.

Mr. *Chapman Barber*, for the Defendant *Smith*:—

The Plaintiffs are barred by the *Statute of Limitations*, and also by reason of their delay or laches in the prosecution of their claim. There is no allegation in the bill that they were ignorant of this legacy, and yet they suffer nearly thirty years to elapse between the death of the testatrix and the filing of the bill. Assuming this to be a legacy, the *Statute of Limitations* prescribes twenty years as the time after which no proceedings can be taken to obtain payment. But then it is contended in argument that there was a trust created against which time will not run. No such allegation is contained in the bill, no case of trust is there raised; the bill simply claims payment of a legacy as against the Defendants in their character of executors. The trust for conversion of the real estate in the will of *John Wade*, so far as relates to the charitable legacies, is void. Moreover, there has been no admission of assets for the purpose of the payment of this legacy, and the claim being barred by the *Statute of Limitations*, the argument based on the supposed admission of assets is irrelevant. Whether the claim is put on the footing of a legacy or a trust, the bill, after this lapse of time, is not sustainable.

[He referred to *Lucas* v. *Jones* (3).]

Sir *R. Baggallay*, in reply.

(1) 6 Hare, 33, n. (2) 7 D. M. & G. 9.
(3) Law Rep. 4 Eq. 73.

Nov. 22. LORD ROMILLY, M.R.:—

This is a suit instituted to obtain payment of a legacy of £1000 given to the General Hospital of *Birmingham* under the wills of *John Wade* and *Frances Wade*:—[His Lordship then stated the material parts of both wills.] The testatrix, *Frances Wade*, died in 1836, and the bill was filed in June, 1866, which was nearly thirty years after her death.

The defence that is set up is, that the legacy is barred by time; in answer to which the Plaintiffs contend that there has been admission of assets sufficient to pay the legacy; and further, that this was a trust.

The first question I have to decide is, whether there has been an admission of assets. In support of this the Plaintiffs rely on the fact that a sum of £1000 was paid to the Infirmary at *Leeds*, at the instance of the Defendant *Smith*, in the year 1856. I am of opinion that this was no admission of assets for the payment of the other charitable legacies. The cases of *Postlethwaite* v. *Mounsey* (1), and others that were cited, all determined that a payment by an executor, to have that effect, must be made with that intention in the ordinary way, for, as Vice-Chancellor *Wigram* puts it (2), the payment by an executor of legacies to servants on his own responsibility, without reference to the state of the assets, cannot bind him to pay all the legacies given by a will.

The circumstances of this case were very peculiar:—[His Lordship then reviewed the evidence as to the payment to the Infirmary at *Leeds*, and said that in his opinion it was a gratuity to the Infirmary by *Smith* and *Robinson*.] If the payment was intended as a gratuity, then it was no admission of assets. Supposing a person who is entitled as executor to the residue of property should say to a legatee that the estate is insufficient to pay him his legacy, but that out of personal regard he would pay it out of his own pocket, could it be said that that was an admission of assets to pay the other legatees and creditors? If an executor were to pay a debt in that way, there can be no doubt (although I do not much approve of the law in that respect) that it would only be an admission of assets to pay debts of a superior order, but not those of an

(1) 6 Hare, 33, n. (2) 6 Hare, 35, n.

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equal order, as to which he could not, by reason of having selected some, be compelled to pay the others.

I am, therefore, of opinion, that this payment, according to the statements in the bill and the evidence, does not amount to an admission of assets for the payment of the other charitable legacies.

Another matter which is relied upon as an admission of assets appears to me to amount to nothing of the sort. It is this,—after the death of *Robinson*, *Smith*, who was residuary legatee with *Robinson*, stated that *Robinson* had never accounted to him or let him know what was payable in respect of his share, which he insisted ought to be done, and a correspondence ensued between *Robinson's* executors and *Smith*, the result of which was, that by way of compromise they gave him £700 as his share of the residue; thereupon he gave them a release in full. Can it be said that is an admission of assets to pay all the legacies? I am of opinion that it is only an admission that there was then £700 applicable to the due administration of the estate.

If the matter were now new, the proper decree would, unquestionably, be for an account of the real and personal estate of the testatrix, with a direction to ascertain how much was pure personalty and how much savoured of realty, and, that being ascertained, the legacies would have to be paid in the proportion of the realty to the pure personalty, and the balance paid to the legatees. But this bill is filed, as I have stated, nearly thirty years after the death of the testatrix, and that being so, it cannot be supported unless it is a case of trust.

On this question I am of opinion that there is no trust in the proper sense of the word. It has been determined in *Scott* v. *Jones* (1), and that class of cases, that if a testator gives real and personal estate in trust to pay debts and legacies, that is no bar to the *Statute of Limitations*, for if a testator merely imposes upon his executors that which it is their regular duty to do, he does not, except as to real estate, create a trust. I was struck with the argument of Mr. *Chapman Barber* on this point, who contended, that in the bill it was not put on the ground of a trust, that the legacy was not claimed as a trust, that there was no allegation that a

(1) 4 Cl. & F. 382.

certain sum of money was ascertained and set apart as a trust for the purpose of this bequest, but what is stated is simply this: that the testator, *John Wade*, directed that his property should be converted, and then held in trust for his mother and sister for their joint lives and the life of the survivor, and after the death of the survivor as his mother, *Frances Wade*, should by her will appoint.

Now, it is quite settled by various authorities, of which the last, I think, is *Brook* v. *Badley* (1), that such a conversion does not prevent the operation of the *Statute of Mortmain*, which would therefore apply to the distribution of this fund in the same manner as if it had been the real estate of *Frances Wade*. Where, then, is the trust that has been here created? It is really nothing more than giving the property to *Frances Wade* as a part of her own personal estate, of which she disposes by her will, and although she uses the word "appoint," that amounts to nothing more than the gift of an ordinary legacy.

This subject was much discussed in the case of *Phillipo* v. *Munnings* (2). In that case, if the money in question had not been set apart to answer the legacy there would have been no trust, but as soon as the executor set apart the sum of money from the general estate to answer the particular legacy, then it became a trust in his hands. In this case no fund was set apart, no particular trust was created, or is alleged, and the mere use of the word "trust" in the will of *John Wade* cannot make any difference.

If, then, there was no trust created, and this was the point in the case which I had most to consider, then I am of opinion that the *Statute of Limitations* is a good defence, because the words of the statute are distinct, that no legacy can be claimed after the lapse of twenty years, and this Court does not encourage stale demands, and no reason can be given why the trustees of the Hospital should not have made their claim in proper time.

This defence cannot, I think, be rebutted by the allegation that they did not know when the will was proved. The probate of the will is notice to everybody having any claim, and the statute does not provide any indemnity or save any rights because a legatee

(1) Law Rep. 3 Ch. 672. (2) 2 My. & Cr. 309.

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does not know of his legacy. The Plaintiffs' case fails altogether, and the bill must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Taylor, Hoare, & Taylor,* agents for Messrs. *Griffiths & Bloxam, Birmingham.*

Solicitors for the Defendants: Messrs. *Jacobs & North;* Mr. *T. W. Nelson,* agent for Messrs. *Nelson, Bulmer, & Nelson, Leeds.*

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WOLLASTON *v.* TRIBE.

Settlement—Consideration of Marriage—Children of future Marriage—Collateral Relatives—Voluntary Gift—Power of Revocation—Setting aside Gift.

Trusts in a marriage settlement in favour of the children of a future marriage and of collaterals are purely voluntary.

A person taking a benefit under a voluntary gift which is not subject to a power of revocation has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable.

A voluntary gift not subject to a power of revocation, but not meant to be irrevocable, may be set aside by the donor.

THE Plaintiff was the widow of *Robert Wollaston,* and had been married to him on the 28th of September, 1858. In contemplation of the marriage, a settlement was executed whereby certain real estate to which the Plaintiff was entitled was conveyed to trustees upon trust, after the marriage, to pay the rents and profits to the Plaintiff during her life for her separate use, without power of anticipation, and after her death upon trust for *Robert Wollaston* and his assigns during his life: and after the decease of the Plaintiff and *Robert Wollaston,* which should last happen, upon trust for all or such one or more of the children of the Plaintiff by her then intended or any future husband, or the issue of such children born in the lifetime of the Plaintiff, as she should in manner therein mentioned appoint, and in default of such appointment upon trust for all and every the children of the Plaintiff by her then intended or any future husband in equal shares as tenants in common in fee, with a gift over, in the event of any such child dying under twenty-one without leaving lawful issue, of his share to the surviving and other children of the Plaintiff by her then intended or

any future husband: but in case there should be no such child, or none such who should attain twenty-one, or who dying under that age should leave issue living at his or her death, then in trust for such of the nephews and nieces of the Plaintiff, the children of her sister *Elizabeth*, the wife of *Henry John Gore*, and *Laura Frances*, the wife of *Edwin Henty*, as should be living at the death of the Plaintiff and *Robert Wollaston*, and the failure of issue of the Plaintiff, which should last happen, as tenants in common in fee. The settlement contained a power of leasing the real estate, to which the consent of the Plaintiff was not required. By the same settlement certain personal estate of the Plaintiff's was settled upon trusts for investment at the discretion of the trustees, and then upon trust for the Plaintiff during her life for her separate use, without power of anticipation, and after her death for *Robert Wollaston* and his assigns during his life if he should survive her, and after the death of the Plaintiff and *Robert Wollaston*, which should last happen, for all or such one or more of the children or other issue of the Plaintiff living at her decease by her then intended or any future husband, as she should in manner therein mentioned appoint, and in default of appointment for all and every the child and children of the Plaintiff by her then intended or any future husband, who being a son should attain the age of twenty-one years, or being a daughter should attain that age or marry, in equal shares; and if there should be no such child who should live to attain a vested interest under the preceding trusts, then for such of the said nephews and nieces of the Plaintiff as should be living at the death of the Plaintiff and *Robert Wollaston*, and the failure of children of the Plaintiff taking vested interests, which should last happen, as tenants in common: and if there should be no such nephews and nieces, for the next of kin of the Plaintiff according to the *Statute of Distributions*, as if she had then died sole and intestate. Then followed several covenants by the Plaintiff and *Robert Wollaston* for the settlement, upon corresponding trusts, of any real or personal estate which should, after the solemnization of the marriage, descend, or come to, or devolve upon, or be given, devised, or bequeathed to or in trust for the Plaintiff or *Robert Wollaston* in her right. The settlement contained a power to appoint new trustees, to the exercise of which no concurrence or consent of the Plaintiff

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was required. No property was brought into settlement by *Robert Wollaston*.

Robert Wollaston died on the 22nd of August, 1865. There was no issue of the marriage. The Plaintiff had not married again.

In 1868 the Plaintiff filed this bill against the trustees of the settlement, Mr. and Mrs. *Henty*, Mr. and Mrs. *Gore*, and their children, alleging that the trusts and provisions in the settlement contained for the benefit of her issue by a future husband, and also the covenant for the settlement of her after-acquired property, were inserted without her knowledge and contrary to her intentions; and praying for a declaration that such trusts, provisions, and covenant were void as against her, and for a re-conveyance and re-transfer to her of the settled property.

The suit now came on to be heard. It appeared that at the time of her marriage the Plaintiff was forty-one years of age, and lived with a maiden aunt in the country. She had no brother, and only the two sisters named in the settlement. She was entirely inexperienced in business matters; and shortly before her marriage consulted her brother-in-law, Mr. *Henty*, with respect to the settlement of her property, telling him, in general terms, that she wished it settled on herself, and then on her nephews and nieces. Mr. *Henty* instructed a solicitor in the neighbourhood to prepare a settlement. This solicitor made a memorandum of his instructions, by which it appeared that the limitation in default of children of the Plaintiff was to be in favour of her nephews and nieces living at the time of distribution. On these instructions he began to prepare a draft of the settlement, leaving, as he said, the ultimate limitation an open question until he had seen the Plaintiff. He had an interview with her on the 11th of September, 1858, and, as he stated, ascertained that her wishes were in accordance with the memorandum he had made. The Plaintiff's account of the interview was, that she simply made a statement to him to the same effect as she had made to Mr. *Henty*. It appeared from the draft that the ultimate limitation (which was in the handwriting of the solicitor's clerk) of the real estate was originally in favour of the Plaintiff, her heirs and assigns: but this was altered in the handwriting of the solicitor himself, as it ultimately stood; and the solicitor deposed that he made this alteration after he had received

the Plaintiff's explicit instructions thereon. He afterwards offered to read the draft to the Plaintiff; but she refused, as she did not understand law terms; and at the time the deed was executed he repeated the offer with a similar result. He did not think that he explained to the Plaintiff the position in which she would be placed by the settlement in the event of her surviving *Robert Wollaston* and having no issue: and he was sure that he did not suggest to the Plaintiff the propriety of inserting a power of revocation in that event. The Plaintiff denied that she ever received any such explanations.

It appeared that the Plaintiff became acquainted with the effect of the settlement very soon after her marriage, and expressed her dissatisfaction therewith.

Mr. *Joshua Williams*, Q.C., and Mr. *Ware*, for the Plaintiff:—

The settlement, so far as it exists, is purely voluntary, all the interests which were within the consideration of marriage having expired. It is the duty of a solicitor who prepares a voluntary settlement to see that it is thoroughly understood by the settlor, and to suggest the propriety of inserting a power of revocation: *Huguenin* v. *Baseley* (1); *Harbidge* v. *Wogan* (2); *Nanney* v. *Williams* (3); *Forshaw* v. *Welsby* (4); *Cooke* v. *Lamotte* (5); *Coutts* v. *Acworth* (6). The solicitor who prepared this draft did not fulfil this duty; for he admits that he did not explain to the Plaintiff what her position would be in the events that have happened; nor did he suggest the propriety of inserting a power of revocation. Under these circumstances the settlement, being voluntary, must be set aside; it cannot be rectified: *Lister* v. *Hodgson* (7); *Phillipson* v. *Kerry* (8).

Sir *R. Baggallay*, Q.C., Mr. *Southgate*, Q.C., and Mr. *Bovill*, for the Defendants:—

In this case there is no element of fraud or undue influence, as there was in *Huguenin* v. *Baseley*, *Cooke* v. *Lamotte*, and other cases cited for the Plaintiff. Further, this deed is not entirely

(1) 14 Ves. 273.
(2) 5 Hare, 258.
(3) 22 Beav. 452.
(4) 30 Ibid. 243.
(5) 15 Beav. 234.
(6) Law Rep. 8 Eq. 558.
(7) Ibid. 4 Eq. 30.
(8) 32 Beav. 628.

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voluntary; therefore it cannot be set aside. All the cases cited, other than those involving undue influence, relate to deeds which are purely voluntary. Even with respect to them it is laid down by Lord Justice *Turner*, in *Toker* v. *Toker* (1), that "absence of advice as to the insertion of a power of revocation is a circumstance, and a circumstance merely, to be weighed in connection with the other circumstances of the case."

In the case of a settlement which is not purely voluntary, all that can be done is to reform the settlement either by striking out clauses which have been improperly inserted, or by inserting clauses which have been improperly omitted. How can that be done in this case? Where, for example, ought a power of revocation to be inserted? If merely before the gift to the nephews and nieces, that leaves the provision for future children operative; and it is difficult to make such a provision for future children as is here contained revocable. In *Harbidge* v. *Wogan* (2) there was no such provision, and the difficulty did not occur.

Further, if the settlement is not in the form the Plaintiff wished, she is alone to blame for that. She refused to have the deed read to her: how can she now say that she did not know its contents? It is quite clear she intended to make some provision for her nephews and nieces; that provision may be voluntary; but a deed cannot be set aside merely because it is voluntary: *Pulvertoft* v. *Pulvertoft* (3).

Again, a Plaintiff, having a case to set aside a deed, is bound to bring it forward at the earliest possible moment. Here the Plaintiff knew the contents of the deed soon after her marriage; neither she nor her husband do anything in the lifetime of the latter; and the Plaintiff waits for some time after her husband's death before she files the bill. The death of the husband materially alters the case: material information might have been obtained from him.

Nov. 15. LORD ROMILLY, M.R.:—

In this case I do not think the settlement can stand as it is at present. It is a case in which a lady married at not a very early

(1) 3 D. J. & S. 492. (2) 5 Hare, 258.
(3) 18 Ves. 84.

age. She had some independent fortune, and that is settled in this way: first on herself for life for her separate use, without power of anticipation, then on her husband for life, then on the children of the marriage and those of any future marriage, and if she had no children, then on her nephews and nieces. The husband is dead; there was no issue of the marriage; and the lady has not married again; so that the only part of the settlement which is now subsisting is purely voluntary, and not within the consideration of marriage. Of course a voluntary gift is perfectly good if the person who makes it knows what it is, and intends to carry it into execution; but the lady seems to me not to have known or understood what she was doing.

In the first place, the settlement is not in the usual form. According to the usual form, Mrs. *Wollaston* would have had reserved to her a power of appointment in case she had no children, and then, in default of appointment, the property would have been given to the nephews and nieces. It is quite clear in this case that she intended the nephews and nieces to take under the ultimate limitation, but it is by no means clear that she intended to deprive herself of all choice in the matter.

This strikes me as a material circumstance. One of the Defendants, Mr. *Henty*, a brother-in-law of the Plaintiff, was the person who gave the instructions for the settlement. What was written down by the solicitor who took the instructions is very plain; but there is nothing to shew that the ultimate limitation to the nephews and nieces was to be irrevocable. If these instructions had been sent to a draftsman, he would certainly either have introduced a power of revocation, or called attention to the point. Having received these instructions, the solicitor immediately begins to prepare the settlement without seeing the lady, and gives orders to his clerk to prepare a draft. The clerk draws it very well, for he makes the ultimate limitation to the Plaintiff, her heirs and assigns. The solicitor's attention is expressly called to this point; he speaks to the lady on it; she says that she wishes the property to go to her nephews and nieces; but she does not say that it is to be given to them so that she cannot alter it. She might very well think: "I wish it to go to them; let it be given to them; and if I do not change my mind, this will save me the trouble of making a will." But it

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does not follow that she did not intend to reserve power to herself to change her mind, and alter the gift. I assume that it was the Plaintiff's own proposition to give it to the nephews and nieces, but it does not follow that it was to be an irrevocable gift; and it is quite certain, from the solicitor's evidence, that he never told her that it was irrevocable. He says: "I do not think that I explained to the Plaintiff the position in which she would be placed by the settlement in the event of her surviving the said *Robert Wollaston*:" but that is just what he ought to have explained. She never had fully explained to her the peculiar nature of the settlement which she executed, and she was really in the hands of persons who derive a benefit from the settlement.

The settlement is also very defective in this respect, that it takes away completely all control by the Plaintiff over the property. She cannot grant a lease; she cannot alter an investment; new trustees may be appointed without her concurrence; and, as she says in one of her letters, she is nothing but an annuitant on her own property.

Great stress was laid on the lapse of time; but I think nothing of that, because all the persons interested are in the same state now as they were then. If there had been any dealing which had altered the state of matters, that might have raised a question; but there is nothing of the sort. Therefore I must declare that the clauses of the settlement now in force are void as against her, and direct a re-assignment of the property; but it is not a case for costs.

Mr. *Joshua Williams* said the Plaintiff was willing to pay the costs of all parties as between party and party.

Solicitors: Messrs. *Woollaston & Davison;* Mr. *H. S. Willett.*

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Nov. 9; Dec. 3.

Specific Performance—Compensation—Notice to Purchaser of Tenancy.

Where a vendor contracted to sell certain property which the purchaser knew to be in occupation of a tenant, and it was afterwards discovered by the purchaser that the tenant had a lease:—

Held, that the purchaser was affected with notice of the lease, and was not entitled to specific performance with compensation.

THIS was a suit by a purchaser for specific performance of a contract, with compensation.

In November, 1868, the vendor was the owner in fee of certain copyhold hereditaments at *Hanwell*, consisting of five adjacent houses and six acres of land behind them. Two of the houses and a piece of land behind them were in the occupation of the Plaintiff. Another of the houses was in the occupation of a Mr. *Allen*. The two other houses were in the occupation of two other persons as yearly tenants.

After some negotiation with reference to the purchase by the Plaintiff of this property, the Plaintiff, in November, 1868, offered the Defendant £5000 for the property, and the Defendant accepted the offer by a letter to the Plaintiff of the 19th of November in the following terms:

"I accept your offer of £5000 for my property at *Hanwell*, consisting of five houses and about six acres of land, provided a deposit of £500 be paid to me to-morrow at one o'clock; and for the above sum I agree to deliver to you the said property as freehold, and to enter into a formal contract for the carrying out of the same, as soon as it can be drawn up by my solicitor."

On the following day the Plaintiff paid the deposit of £500, and on the 3rd of December, 1868, the Defendant's solicitor sent to the Plaintiff's solicitor a draft of a formal agreement for the purchase, by which it appeared that *Allen* had an agreement from the Defendant for a lease of his house, and also an agreement for a lease of all the vacant land (except that in the Plaintiff's possession) for twenty-one years from Christmas, 1861.

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The Plaintiff admitted that he was aware that *Allen* was in occupation of part of the property, but stated that till he received the draft he was not aware that he had any agreement for a lease, or was anything more than a tenant from year to year. He alleged that the property was in a building neighbourhood, that its chief value consisted in the vacant building ground, and that he bought it with a view to building, for which purpose immediate possession was essential.

The bill prayed that the contract might be specifically performed, and that an abatement might be made from the purchase-money in respect of the agreement for a lease to *Allen* of the vacant land.

Mr. *Southgate*, Q.C., and Mr. *Waller*, for the Plaintiff:—

The Plaintiff is entitled to specific performance, and to a conveyance from the vendor of such interest as he has, with compensation in respect of that part of the property which is subject to an agreement for a lease: *White* and *Tudor*'s Leading Cases (1).

In *Painter* v. *Newby* (2), where the particulars of sale described part of a property as customary leasehold holden of a manor, and renewable every twenty-one years, and the property proved to be held for the residue of a term without any right of renewal, and the conditions provided that the purchaser should accept the existing lease as a sufficient title, and that compensation should be given to a purchaser for any misdescription, it was held that the purchaser was entitled to specific performance, with compensation.

In *Nelthorpe* v. *Holgate* (3), where a person seised in fee of an estate subject to the life interest of his mother, contracted to sell to a person who had no actual notice of his mother's interest, but knew or might have known that she resided on the property, it was held that though this might have been constructive notice as between an occupier and purchaser, it was not as between a vendor and purchaser, so as to deprive the latter of his right to compensation in respect of the life interest.

In *Mortlock* v *Buller* (4) it was held that where a vendor, represented and contracted to sell an estate as his own, he could not

(1) 3rd Ed. vol. ii. p. 499.
(2) 11 Hare, 26.
(3) 1 Coll. 203.
(4) 10 Ves. 292, 316.

object that he had only a partial interest, and that the purchaser was entitled to as much as he could have, and to an abatement. So in *Wood* v. *Griffith* (1) it was laid down that where a person possessed of a term contracted to sell the fee, he could not compel the purchaser to take, but the purchaser could compel him to convey the term, and the Court would arrange the equities between the parties.

In *Hanbury* v. *Litchfield* (2), under special circumstances, the Plaintiffs, who had entered into an agreement with the Defendants for a lease for thirty-one years, were decreed to accept a legal lease for twenty-one years, and a covenant for a further term of ten years, with compensation for the difference in pecuniary value.

Sir *R. Baggallay*, Q.C., and Mr. *W. W. Cooper*, for the Defendant:—

The Plaintiff was well aware at the time that he entered into the contract that *Allen* was in occupation of part of the property, and that he could not have immediate possession. He was, therefore, put upon his inquiry as to the nature of the tenancy, and though we do not dispute his right to specific performance of the contract with such title as the Plaintiff can give him, yet he is not entitled to any abatement or compensation.

In *Taylor* v. *Stibbert* (3) Lord *Rosslyn* laid down that whoever purchased an estate from an owner knowing it to be in possession of tenants was bound to inquire into the estates which those tenants had. The principle of that case was adopted in *Hiern* v. *Mill* (4).

The case of *Nelthorpe* v. *Holgate* (5) is in reality not an authority in the Plaintiff's favour, for though the purchaser was there held to be entitled to compensation, yet Vice-Chancellor *Knight Bruce* in his judgment said (6):—"I so decide upon the ground of the particular circumstances of this case, without acceding to the broad and general argument which has been urged on the Plaintiff's part as to the performance of contracts with compensation wherever the vendor can give part but not the whole of what he has contracted to sell."

(1) 1 Sw. 43, 54.
(2) 2 My. & K. 629.
(3) 2 Ves. 437.
(4) 13 Ves. 114, 121.
(5) 1 Coll. 203.
(6) Ibid. 223.

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In *Hall* v. *Smith* (1) notice to a purchaser of a lease was held to be notice of its contents. In *Daniels* v. *Davison* (2) the possession of a tenant was held to be notice to a purchaser of the nature and extent of his interest. In *Lewis* v. *Bond* (3), where *A.* agreed to grant a lease to *B.* who knew that *A.* held under a leasehold title, it was held that *B.*, must be deemed to have known that *A.* could only grant a lease with such restrictions as those under which he held.

So in *Wilbraham* v. *Livesey* (4) the purchaser of a property was held to have notice of the interest of the tenant in possession.

Upon the principles recognised in these cases the purchaser here had implied notice of the interest of the tenant, and his claim to specific performance with abatement cannot be sustained.

Mr. *Southgate*, in reply.

Dec. 3. LORD ROMILLY, M.R., after stating the facts of the case, continued:—

The Plaintiff insists that the great value of the land consists in the circumstance that the possession of it could begin at once in order to let it out in building leases, and he submits that he is entitled to compensation for this undisclosed circumstance, of which he had no notice prior to the receipt of the draft contract.

The Plaintiff in his evidence does not deny that he knew that *Allen* was the tenant of this property, and the real question to be determined is, whether this knowledge put him on inquiry to learn from *Allen* the nature, extent, and character of his tenancy.

The case of *Daniels* v. *Davison* determined that, as between the tenant himself and the purchaser, the purchaser was bound to inquire, and could not dispute the tenant's right. Does that duty apply to the case between vendor and purchaser as well as between purchaser and tenant? I have found no case exactly in point, but the principle appears to me to be the same, and to be applicable to both cases. Why is the purchaser bound to inquire as regards the tenant, and yet not bound to inquire as regards his rights against

(1) 14 Ves. 426.
(2) 16 Ibid. 249.
(3) 18 Beav. 85.
(4) Ibid. 206.

the vendor? The principle is thus stated in argument in that case (1): "Whatever puts a purchaser upon inquiry shall be held notice; and if therefore he knows that a tenant is in possession, he is considered as having notice of the whole extent of his interest."

This was adopted by the Lord Chancellor, who decided accordingly, and I am unable to see any ground for a technical and, as it appears to me, an arbitrary distinction, which should limit the application of the rule to one person, when the reason of it extends to all persons whatsoever.

If the purchaser, knowing of the tenancy, is bound to inquire, as regards the tenant, as to his interest in the land, and if the purchaser must be taken to be bound to know what would be the result of such inquiry as regards the tenant, why should he not be so bound as regards the vendor? and if the purchaser chooses to bind himself by agreement with this vendor, knowing of the tenancy, but without having accurately ascertained what was the extent and character of it, and what the results of such inquiry would have led to, he must, as it appears to me, be bound in the same manner as regards all other persons. I think, also, that no distinction can properly be drawn in a Court of Equity, on the ground that the matter rests in contract, and that the conveyance of the legal estate has not been made to him. The purchaser bound himself by contract. He must be taken to have had present to his mind all those things of which he had notice, and those things which necessarily flowed from, and were incidental to, that notice. He knew that *Allen* was tenant of this land; he was bound to inquire what the tenancy was unless he was willing to be bound by the tenancy whatever it was. The bill must be dismissed with costs unless the Plaintiff elects to take the property without compensation.

Solicitors for the Plaintiff: Messrs. *Dawson, Bryan, & Dawson.*
Solicitor for the Defendant: Mr. *J. C. G. Bennett.*

(1) 16 Ves. 251.

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1869
Dec. 10.

KERSHAW *v.* KERSHAW.

Vendor and Purchaser—Appropriation of Purchase-money—Interest.

A purchaser contracted for the purchase of certain real estate at the price of £38,500, which was to carry interest at 5 per cent. until payment, and he was let into possession. Afterwards, difficulties having arisen in completing the purchase, he paid £38,000 into a bank to a separate account, and gave notice to the vendors that this sum was appropriated for the purposes of the purchase, and that he would refuse to pay interest under the contract. The vendors replied that they disputed the sufficiency of the notice, but did not point out that the sum paid in was deficient by £500. On discovering the deficiency, the purchaser paid in £500 with interest at 5 per cent:—

Held, that the purchaser was not liable for interest subsequently to the time when he paid £38,000 into the bank.

THIS was a suit for the administration of the trusts of the will of a testator named *Ralph Kershaw*. It appeared that a portion of the real estate of the testator had been sold under a contract which was partly as follows:—"Amount of purchase-money, £38,500. Purchase to take effect from 30th June, 1868, and interest at 5 per cent. to time of payment, and timely notice to be given as to requirement of the purchase-money."

The purchaser was let into possession on the 30th of June, 1868. Difficulties afterwards arose in completing the purchase by reason of an annuitant, who was entitled to an annuity charged on the property, being resident abroad. On the 12th of November, 1868, the purchase not having been completed, the purchaser gave notice to the vendors that he had appropriated for the purposes of his purchase, and transferred to a separate account at a bank, the sum of £38,000; and that he was ready to complete the purchase, and would not pay interest under the contract. On the 13th of November, 1868, the vendors replied as follows: "We beg to acknowledge the receipt of a notice from you in this matter, dated the 12th instant, the sufficiency of which however we dispute."

In September, 1869, the purchaser discovered that he ought to have paid £38,500 into the bank; and thereupon he paid into the bank the sum of £500, with interest at 5 per cent. up to that time.

The purchase-money had since been transferred into Court, and

the vendors now applied by summons that the purchaser might be ordered to pay interest at 5 per cent. on the purchase-money from the 30th of June, 1868, to the time when the payment into Court was made.

Mr. *Hamilton Humphreys* (Mr. *Southgate*, Q.C., with him), for the vendors, contended that under these circumstances there had not been such an appropriation of the purchase-money as would prevent interest from running subsequently to the 12th of November, 1868; and he cited *Dickenson* v. *Heron* (1); *Esdaile* v. *Stephenson* (2); *Binks* v. *Lord Rokeby* (3); *Winter* v. *Blades* (4); *Sugden's* Vendors and Purchasers (5).

Mr. *Jessel*, Q.C., and Mr. *Ince*, for the purchaser, were not called upon.

LORD ROMILLY, M.R.:—

It is quite clear that if the purchaser had paid £38,500 into his bankers to a separate account, and said that it was lying idle, that would have stopped the interest; and if the vendors wished for interest they ought to have called on him to invest it. There is nothing in the contract to make him liable for interest after appropriating the purchase-money in this way Then what he does is this, he pays in £38,000 only; and the vendors write this letter in reply to his notice:—[His Lordship read it.] It is to be observed that they do not tell him that he has not paid in enough: all that they say is that the notice is not sufficient. The case is quite different from that of *Winter* v. *Blades;* there the purchaser had simply a floating balance at his bankers; but here this sum of £38,000 was throughout appropriated to the purchase. Then the vendors say nothing about the deficiency, and after a while the purchaser finds out the defect, and pays in £500 and interest. I think that in substance he paid in the whole purchase-money on the 12th of November, 1868, and that the slight defect which there was at first he has completely repaired. Therefore, I do not think he is

(1) Sug. V. & P. 14th Ed. p. 630. (3) 2 Sw. 222.
(2) 1 S. & S. 122. (4) 2 S. & S. 393.
(5) 14th Ed. p. 628, pl. 3.

M. R. 1869 KERSHAW v. KERSHAW.

chargeable with interest after the 12th of November, but he must pay to the vendors any interest he may have received from the bank in respect of the sum which he paid in.

Solicitors: Messrs. *Johnson & Weatheralls;* Messrs. *Clarke, Woodcock, & Ryland.*

M. R. 1869 Dec. 11.

WALL *v.* ROGERS.
WALL *v.* OGLE.

Trust Fund—Breach of Trust—Compromise—Married Woman—Reversionary Interest.

The Court has jurisdiction to sanction on behalf of a married woman a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which the married woman has a reversionary interest.

Upon a Petition to the Court to sanction such a compromise, the married woman should appear separately from her husband.

JULIA AMELIA, the wife of *Cornelius Wall*, *Theresa Ogle*, *Emma Ogle*, and *Gustavus Ogle*, were respectively entitled to undivided shares in a trust fund, subject to the life interest therein of their mother, Mrs. *Ogle*. A breach of trust was committed, which resulted in the loss of the trust fund; and the bill in *Wall* v. *Rogers* was filed by *Cornelius Wall* and *Julia Amelia*, his wife, and the other three persons already mentioned (who were *sui juris*) against *Rogers*, the trustee of the fund, and Mr. and Mrs. *Ogle*, praying that *Rogers* might be removed from his office of trustee, that new trustees might be appointed, and that *Rogers* might be decreed to replace the trust fund which had been lost.

About the same time the suit of *Wall* v. *Ogle* was instituted by the same Plaintiffs against Mr. and Mrs. *Ogle*, for the purpose of compelling Mr. *Ogle* to refund a portion of another trust fund, settled upon similar trusts, which, it was alleged, had been improperly paid to him.

An agreement for the compromise of both suits was entered into and signed by Mr. and Mrs. *Wall* and the other Plaintiffs. The main terms were, that Mr. *Ogle* should pay the sum of £100 to Mrs. *Wall*, *Theresa Ogle*, *Emma Ogle*, and *Gustavus Ogle* respec-

tively; that Mr. *Rogers* should pay the costs of Mr. and Mrs. *Wall* and the other Plaintiffs of both suits; and that Mr. *Ogle* and Mr. *Rogers* should be released from all further liability, and that the proceedings in both suits should be stayed.

A Petition for carrying the compromise into effect was presented by the Plaintiffs and Mrs. *Ogle*, whose life interest was settled to her separate use. At the hearing, the Master of the Rolls, upon being asked to sanction the agreement on behalf of Mrs. *Wall*, expressed a doubt whether he could do so, inasmuch as Mrs. *Wall's* interest in the property was reversionary.

Mr. *Jessel*, Q.C., and Mr. *D. Jones*, for the Petitioners, said that all that had been decided was that a married woman could not alienate a reversionary interest, but the jurisdiction of the Court to sanction a compromise was wholly independent of the capacity for alienation of the parties interested. The Court had power to bind infants, lunatics, and even persons not in existence, by a compromise. In *Brooke* v. *Lord Mostyn* (1), Lord Justice *Turner* says: "That this Court has power to compromise the rights and claims of infants and persons under disabilities, where those rights and claims are merely equitable, has not been and cannot be disputed. It is a power which has been continually exercised by the Court, and results almost necessarily from the jurisdiction which the Court exercises over trustees. In the exercise of that jurisdiction the Court may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of *cestuis que trust* who are infants or under disabilities; and to say that *cestuis que trust* can, except under very special circumstances, undo what the Court has ordered to be done, would be to cut away the root of the jurisdiction." In *Wilton* v. *Hill* (2) Vice-Chancellor *Kindersley* held a married woman bound by a compromise of a suit with respect to a fund settled to her separate use without power of anticipation.

Mr. *Stirling*, for *Rogers*, said that the bill and Petition were both by *Cornelius Wall* and *Julia Amelia*, his wife, and conse-

10 Jur. N.S. 1114—6

(1) 2 D. J. & S. 373, 415; S. C. Law Rep. 4 H. L. 304.
(2) 25 L. J. (Ch.) 156.

M. R. 1869 WALL v. ROGERS. WALL v. OGLE.

quently were the bill and Petition of *Cornelius Wall* alone; and he submitted whether it was not necessary to amend both, so that the suit and Petition might be on behalf of Mrs. *Wall*.

Mr. *Cottrell*, for Mr. *Ogle*.

LORD ROMILLY, M.R.:—

I think I may make the order; but Mrs. *Wall* must appear separately, and the Petition must be amended for that purpose. It is not necessary to amend the bill.

[The Petition was amended by making Mrs. *Wall* a Respondent.]

Solicitors: Messrs. *Allen, Colley, & Edwards*; Mr. *H. J. Adcock*; Messrs. *Nokes, Carlisle, & Francis*.

M. R. 1869 *Dec.* 13.

GILLIAT *v.* GILLIAT.

Sale by Auction—Reserved Bidding—Employment of Puffer—30 & 31 *Vict. c.* 48.

Upon a sale of real estate by auction, under conditions stating that the sale is subject to a reserved bidding, it is illegal to employ a person to bid up to the reserved price unless the right to do so is expressly stipulated for.

UNDER the decree made in this cause certain real estate was put up for sale by auction, subject to certain conditions of sale, of which the second was as follows: "The sale is subject to a reserved bidding which has been fixed by the Judge to whose Court this cause is attached."

At the sale the property was knocked down to a purchaser at £29,000, the reserved price.

It afterwards transpired that a person had been employed by the auctioneer to bid for the property, and that he actually made several bids, the last of which was £28,900. The purchaser's agent then bid £29,000, and, no higher bid being made, the auctioneer declared that the reserved price fixed by the Court had been offered, and if there was no higher sum bid the property would be sold for that sum.

The purchaser now applied to be relieved from his purchase, on the ground that the sale had been conducted in a manner rendered illegal by the provisions of the Act 30 & 31 Vict. c. 48, the material sections of which are set out below (1).

The auctioneer who conducted the sale deposed that since the passing of that Act it had been the usual practice in sales by the Court of Chancery, where it was stated that the sale was subject to a reserved bidding, to employ a person to bid; that he had acted on this occasion in accordance with the practice; and that the person whom he employed to bid did not know the reserved price, and would only know that he was not to bid again from the auctioneer's not looking at him.

Mr. *Jessel*, Q.C. (Mr. *Whitehorne* with him), for the purchaser, was stopped by the Court.

Sir *R. Baggallay*, Q.C. (Mr. *Langworthy* with him), for the parties having the conduct of the sale, said that it was quite clear the purchaser had not been injured; but that his clients were

(1) Sect. 4. "And whereas there is at present a conflict between Her Majesty's Courts of Law and Equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the Courts of Law holding that all such sales are absolutely illegal, and the Courts of Equity under some circumstances giving effect to them, but even in Courts of Equity the rule is unsettled: And whereas it is expedient that an end should be put to such conflicting and unsettled opinions: Be it therefore enacted, That from and after the passing of this Act whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law."

Sect. 5. "And whereas, as sales of land by auction are now conducted, many of such sales are illegal, and could not be enforced against an unwilling purchaser, and it is expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both parties: Be it therefore enacted by the authority aforesaid as follows: That the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved. If it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person."

Sect. 6. "And where any sale by auction of land is declared, either in the particulars or conditions of such sale, to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he may think proper."

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simply desirous of having his Lordship's opinion as to the propriety of the sale; and on their behalf, he submitted that the sale was conducted in a perfectly regular manner.

In *Mortimer* v. *Bell* (1), the decision in which led to the passing of the Act in question, Lord *Cranworth* laid down the rule with respect to the employment of a person to bid in these terms: "The practice of the Court of Chancery, in modern times at all events, is to stipulate expressly for the right not to sell under a fixed price, and so, by implication, to employ a person to bid up to that price." The present sale had been conducted entirely in accordance with the rule so laid down, and there was nothing in the Act to make the practice illegal. Sect. 4 left the rights in the case of a bidding being reserved wholly untouched. Sect. 5 merely required that it should be stated in the conditions of sale whether the land was sold without reserve, or subject to a reserved price, or whether a right to bid was reserved. The conditions of sale here stated that the sale was subject to a reserved bidding, that is, to a right to bid up to the price reserved.

LORD ROMILLY, M.R.:—

I think the Act makes a distinction between a reserved bidding and a reserved right to bid. It says that you must state whether there is a reserved price or not, and further, if you state that there is a reserved price, you must also state that a right to bid is reserved in order that you may employ a person to bid on your behalf. Therefore this sale must be set aside, and the purchaser must have his costs of this application.

Solicitors: Messrs. *Bridges, Sawtell, & Co.*; Messrs. *Young, Maples, & Co.*

(1) Law Rep. 1 Ch. 10, 14.

In re JONES.

M. R.
1869
Nov. 20;
Dec. 4.

Solicitor and Client—Taxation—Costs in respect of Business done while uncertificated—Order of Course taken out by Client—6 & 7 Vict. c. 73, s. 26.

The *Solicitors Act* (6 & 7 Vict. c. 73, s. 26) does not extinguish the debt of a solicitor or attorney for costs in respect of business done while uncertificated, but only his remedy.

Accordingly, where a client had taken out an order of course for taxation of his solicitor's bill of costs, with the usual submission to pay what should be found due, and the Taxing Master had disallowed certain items for business done while his certificate had not been renewed:—

Held, that the solicitor was entitled to be allowed the items in question.

THIS was an application by *Richard Bevan Jones*, a solicitor, to review the taxation of his bill of costs relating to a suit in respect of certain items between December, 1866, and June, 1867, which the Taxing Master had disallowed.

The order of course for taxation had been obtained by the client in the usual form, by which he submitted to pay what should be found due.

It appeared that, owing to some mistake of the *London* agents, *Jones's* certificate had not been renewed from the 16th of November, 1866, to the 5th of June, 1867.

The Taxing Master disallowed the items, on the ground that they were in respect of business done while *Jones* was without a certificate, and therefore, according to the invariable practice, could not be allowed.

By the *Solicitors Act* (6 & 7 Vict. c. 73, s. 26) it is provided, "that no person who, as an attorney or solicitor, shall sue, prosecute, defend, or carry on any action or suit, or any proceedings in any of the Courts aforesaid" (any Court of Law or Equity) "without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as aforesaid."

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Mr. *Jessel*, Q.C., and Mr. *Bevir*, in support of the motion:—

An uncertificated solicitor is entitled to be allowed his charges under an order of course for taxation taken out by the client, because the client by his petition submits to pay what shall appear to be due.

It is true that sect. 26 of the 6 & 7 Vict. c. 73, takes away his remedy, so that he cannot maintain an action while his certificate is not in force; but the debt remains, and his lien on the deeds of clients still subsists, so that they could not be taken from him, except on the client submitting to pay what was due.

This is clear from the analogous case of the *Statute of Limitations*, which has been held not to extinguish a debt, but only the remedy. Thus, in *Courtenay* v. *Williams* (1) it was held that an executor might retain so much of a legacy as was sufficient to satisfy a debt due from the legatee to the testator, although the remedy for such debt was at the time of the death of the testator barred by the *Statute of Limitations*. In that case Sir *James Wigram*, in his judgment, referred to *Spears* v. *Hartly* (2), where Lord *Eldon* expressed his opinion, that though the *Statute of Limitations* had run against a demand, if the creditor obtained possession of goods on which he had a lien for the general balance, he might hold them for that demand by virtue of the lien. So in *Higgins* v. *Scott* (3) it was held that the *Statute of Limitations* barred the remedy only, but did not put an end to the debt.

The clause in question in the *Solicitors Act* must be construed on the same principle; and, accordingly, we contend that the Taxing Master's decision was wrong, and that *Jones* is entitled to be allowed on taxation the items in question.

Mr. *Begg*, for the client:—

The Taxing Master has arrived at a right decision. The words of the statute, which provide that no solicitor who has not a certificate then in force "shall be capable of maintaining any action or suit for the recovery of any fee, reward, or disbursement," must be taken to mean any possible form of judicial procedure, and to include the proceedings on taxation. It cannot be said

(1) 3 Hare, 539. (2) 3 Esp. 81.
(3) 2 B. & Ad. 413.

that the debt is not extinguished, for nothing is due which a solicitor cannot properly recover, and here the remedy never existed. The cases under the *Statute of Limitations* have no application, for it is there assumed that there was a good debt originally, and one which might have been revived, though it has become barred by time.

In *Sparling* v. *Brereton* (1), though it was held that proceedings taken on behalf of a Defendant whose solicitor had not at the time renewed his annual certificate would not be set aside as irregular, it was distinctly laid down that in such a case the solicitor would lose his fees.

In the case of *In re Angell* (2), where an attorney's bill of costs had been referred to taxation, and certain items were objected to before the Master, on the ground that the attorney at the time those items were incurred was uncertificated, and the Master had disallowed them accordingly, it was held by the Court of Queen's Bench that the Master had acted rightly.

The question of an uncertificated attorney was also considered in *Fullalove* v. *Parker* (3), where it was held that the objection that the attorney was not duly certificated, and that a party to an action could not on that account recover his costs, must be taken before the Master on the taxation of the costs, and if not taken then, could not afterwards be taken on a motion to set aside the taxation, unless the omission was satisfactorily explained.

Moreover, this is a question of public policy. The statute imposes a penalty on the solicitor for not taking out his certificate and paying the stamp duty, and the Court is bound to carry out the intention of the Legislature.

Lastly, the order of course requires the solicitor to deliver up all deeds and papers. No motion has been made to discharge that order, therefore no argument can be based on the solicitor's lien, which no longer exists.

Mr. *Jessel*, in reply:—

The case of *In re Angell* is not one in point, for there the question of an order for taxation taken out by the client was not

(1) Law Rep. 2 Eq. 64. (2) 6 D. & L. 144.
(3) 31 L. J. (C. P.) 239; 8 Jur. (N.S.) 1078.

M. R. 1869 *In re* JONES.

before the Court. In *Fullalove* v. *Parker* (1) the question was, whether a Plaintiff's costs should not be disallowed on the ground that his attorney was uncertificated; and there, though it was held that the attorney was not entitled to recover any costs, *Willes*, J., observed, that if the Plaintiff had made advances to the attorney, though uncertificated, the attorney would have been entitled to retain the money so advanced. This shews, that though the costs of an uncertificated attorney or solicitor are not recoverable, they are still due. The statute only imposes the penalty of disabling him from maintaining any action or suit, but does not deprive him of his right of set-off in an account.

Dec. 4. LORD ROMILLY, M.R.:—

This is a summons calling upon the Taxing Master to review his taxation as to certain items in a solicitor's bill of costs.

This solicitor was in this position: by an accident arising from a mistake of his *London* agents he was without a certificate for five months. I mention this because, though it does not affect the question I have to decide, it is fit to state that no blame attaches to the solicitor. By the 6 & 7 Vict. c. 73, s. 26, it is provided that "no person who, as an attorney or solicitor, shall sue, prosecute, defend, or carry on any action or suit, or any proceedings in any of the Courts aforesaid" (that is, any Court of Law or Equity), "without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such a certificate as aforesaid."

The client took out an order of course for the taxation of the solicitor's bill of costs on the usual petition, by which he submitted to pay what should appear to be due in respect of the bill. The Taxing Master has disallowed all the charges for the five months during which the solicitor was without a certificate, and in doing so he has followed what is stated to have been hitherto the universal practice. This has led me to look carefully into the matter.

(1) 31 L. J. (C. P.) 239.

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It is to be observed that the clause of the statute, being a penal enactment, must be construed strictly. It does not apply to conveyancing, or to common law business. The question is, whether the want of the certificate puts an end to the debt, or only takes away the remedy. The distinction between destroying a debt and taking away a remedy is a familiar one, as in the case of the *Statute of Limitations*, where there is no means of recovering a debt after six years, and yet the debt is not extinguished. I am of opinion that in this case the debt is still subsisting, although the solicitor can take no steps to enforce its payment.

In the course of the argument I was referred to all the cases bearing on the subject, but the only material one is that of *Fullalove* v. *Parker* (1). In that case an action had been tried in the Secondary's Court of the city of *London*, and the Defendant was ordered to pay the Plaintiff's costs. The solicitor of the Plaintiff had not taken out the proper certificate, and the Taxing Master had notwithstanding allowed the items, the attorney's disqualification not being discovered till afterwards. The Defendant moved in the Court of Common Pleas for a rule to shew cause why the costs should not be disallowed, and the taxation set aside or sent back to the Master, and the rule was refused on the ground that such an objection could not, under the circumstances, be taken after taxation. This shews clearly that in the judgment of the Court the debt was not destroyed. This is evident from the observations of *Willes*, J., who, after stating that the application was made too late, proceeded thus: "If the attorney is really uncertificated he is not entitled to recover any costs; nor is the Plaintiff entitled to recover such costs from the Defendant, except in this case only—if the Plaintiff has made advances to the attorney, he cannot recover them back upon a *condictio indebiti*, as for money paid under a mistake; the attorney, though uncertificated, is entitled to retain the money so advanced, and the Plaintiff would have a right to recover this amount from the Defendant." *Byles*, J., also says: "The objection has not been removed that part of this money may have been paid by the Plaintiff to his attorney, in which case it cannot be recovered back, and the Plaintiff would be entitled to have it repaid by the Defendant."

(1) 31 L. J. (C. P.) 239, 240; 8 Jur. (N.S.) 1078.

M. R. 1869 *In re* JONES.

The next question is, whether this is an action or suit at law or in equity maintained or carried on by the solicitor for the recovery of his bill. I am of opinion that it is not, because the solicitor has taken no step in the matter. I express no opinion as to what would have been the effect of an order for taxation taken out by the solicitor; but as this was a step taken by the client, who has moreover undertaken to pay what should be found due to the solicitor, it was not, in my opinion, a proceeding within the meaning of the Act.

I am of opinion that the debt was still due, and that the Act does not take away the right of the solicitor either to set off the debt, or to apply to its discharge money which was already in his hands, and the result is, that the bill must go back to the Taxing Master, with a direction that he is to tax the items which he disallowed by reason of the solicitor not being certificated.

Solicitors for the Applicant: Messrs. *G. L. P. Eyre & Co.*
Solicitor for the Client: Mr. *C. M. Stretton.*

M. R. 1869 Nov. 20.

In re GLEBE LANDS OF GREAT YELDHAM.

Lands Clauses Act—Purchase-money paid into Court—Insolvent Company—Petition for Payment of Costs.

Where glebe lands had been taken by a railway company, and the purchase-money paid into Court under s. 69 of the *Lands Clauses Act*, and an order had been made on the petition of the rector for its investment, and for payment of the dividends to him for his life, and for payment by the company of his costs,—the company having since become insolvent, leaving part of the costs unpaid:—

Held, that part of the fund in Court might be sold for payment to the solicitors of the rector of the amount of costs remaining due.

THIS was a Petition by the rector of *Great Yeldham* that part of a sum of stock representing the sum of £286, purchase-money of certain glebe lands in the said parish, taken by the *Colne Valley and Halstead Railway Company*, and paid into Court under sect. 69 of the *Lands Clauses Act*, might be sold for the payment of certain costs remaining due to him.

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By an order of the Court made on the Petition of the rector, the amount so paid into Court had been ordered to be invested, and the dividends paid to the rector for his life, and the company were ordered to pay his costs, which were taxed at £140. A part only of this sum had been paid by the company.

The Petition stated that the company was now insolvent, and prayed that a sufficient part of the fund in Court might be sold for payment to the solicitors of the Petitioner of the balance remaining due in respect of the costs amounting to £52.

Mr. *Rowcliffe*, for the Petitioner.

THE MASTER OF THE ROLLS considered that the order might be made.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle.*

ATTORNEY-GENERAL *v.* DRAPERS' COMPANY.

M. R.
1869
Dec. 10.

Costs—Taxation—Surveyor's Charge—Ryde's Scale—Lands Clauses Act, s. 80.

Upon the taxation of a bill of costs relating to the re-investment in land of moneys paid into Court under the *Lands Clauses Act*, the Taxing Master allowed a lump sum for surveyor's charges, being a commission on the amount of the purchase-money according to *Ryde's Scale*, which is a scale prepared by an eminent surveyor of that name on the principle that a commission varying from 5 to one-half per cent. should be paid to the surveyor according to the amount of the purchase-money. An application was made to the Court to direct the Taxing Master to review his taxation in respect of this item:—

Held, that the question was in reality one not of principle but of amount, and that the Court would not interfere; but that if it were a question of principle a prevailing practice of paying surveyors by commission ought not to be disturbed.

CERTAIN lands of the *Drapers' Company* in the City of *London* having been taken by the *South Eastern Railway Company* under the powers of their Acts, the purchase-money was paid into Court in this suit, and a Petition was afterwards presented for a re-investment in land of the sum so paid in. Upon this petition the usual order was made sanctioning the proposed investment, and directing the taxation and payment to the *Drapers' Company* of their costs,

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including all reasonable charges and expenses, in accordance with the *Lands Clauses Act*, s. 80.

Upon the taxation of the bill of costs the Taxing Master allowed an item of £73 for the charges of the surveyor employed by the *Drapers' Company* to survey and report upon the value of the property proposed to be purchased by them, and this item was the amount of commission on the purchase-money (£12,150) according to *Ryde's Scale*, being a scale prepared by an eminent surveyor of that name, on the principle that a commission varying from 5 to one-half per cent. should be paid to the surveyor, according to the amount of the purchase-money. The highest commission, amounting to 5 per cent., is payable only when the purchase-money does not exceed £100; and the percentage diminishes rapidly as the amount of purchase-money increases.

The railway company now applied that the Taxing Master might be ordered to review his taxation with respect to this item, on the ground that they were liable to pay only the reasonable costs of the surveyor, calculated separately for every attendance and valuation made by him, and every plan prepared by him.

Mr. *Phear*, in support of the application, submitted that the Master had proceeded on a wrong principle in allowing this item; inasmuch as he had allowed the surveyor to be paid by commission, instead of on a *quantum meruit*. This mode of payment was not, he stated, allowed in the common law offices; and further, was capricious and unreasonable, inasmuch as it appeared by the evidence that surveyors' charges, if paid under the like circumstances by the corporation of *London*, were higher in amount than those allowed by *Ryde's Scale*.

Mr. *Bowring*, for the *Drapers' Company*, was not called on.

LORD ROMILLY, M.R.:—

This application is altogether misconceived. In these cases I never go into a mere question of amount, and Mr. *Phear*, knowing that, tried to put it on principle, but the question is, in fact, what is the proper sum to be allowed for the surveyor's charges, and the Master has exercised his discretion upon that, and I cannot go into

it. Besides, even if it were a question of principle I should not be inclined to interfere. The charges of brokers on the transfer of stocks and shares are paid by a commission, and if a similar practice prevails with respect to surveyors' charges I shall not disturb it; it prevents disputes as to amount; and the charges fixed by the scale do not seem too high.

M. R. 1869 ATTORNEY-GENERAL v. DRAPERS CO.

Solicitors: Mr. *E. P. Cearns;* Messrs. *Lawford & Waterhouse.*

In re WILKINSON'S SETTLED ESTATES.

M. R. 1869 Nov. 25.

Settled Estates Act (19 & 20 *Vict. c.* 120)—*Practice—Petition—Death of Petitioner—Amendment.*

After a Petition under the *Leases and Sales of Settled Estates Act* had been served and advertised, the Petitioner died:—

Held, that the Petition might be amended by stating the fact, and substituting a new Petitioner.

IN this case a Petition had been presented under the *Leases and Sales of Settled Estates Act*, by the tenant for life of a settled estate, and considerable expense had been incurred in advertising the Petition and serving it on the Respondents, some of whom were resident in *America*. Before the Petition could be heard, the Petitioner died.

Mr. *Charles Browne* now applied for leave to amend the Petition by stating the death of the original Petitioner, and substituting the first tenant in tail of the estate, who was an infant, as Petitioner, the object being to prevent the expense already incurred in reference to the Petition from being thrown away. He referred to *Maude* v. *Maude* (1).

The MASTER OF THE ROLLS gave leave.

Solicitors: Messrs. *Parke & Pollock.*

(1) 5 De G. & Sm. 418.

M. R.
1869
Dec. 10.

In re ELMSLIE & CO.

Solicitor and Client—Bill of Costs—Bankruptcy of Client—Taxation by Assignee—Undertaking to pay.

Where the client of a solicitor becomes bankrupt, and the solicitor does not prove for the amount of his bill of costs in the bankruptcy, the assignee cannot obtain an order to tax without giving an undertaking to pay the whole amount of the bill.

A CLIENT of Messrs. *Elmslie & Co.* deposited with them the title deeds of certain property as a security for the payment of a bill of costs due from him to them. He was afterwards adjudicated bankrupt, and his assignee applied for and obtained from Messrs. *Elmslie* a copy of the bill of costs. The assignee now applied for an order for the taxation of the bill, without prejudice to Messrs. *Elmslie's* lien, and upon an undertaking to pay to them from time to time out of the estate of the bankrupt a dividend on the amount due to them rateably with the other creditors.

Mr. *Ince*, in support of the application:—

It usually happens in cases of this sort that the solicitor proves in the bankruptcy, and then the Court lays hold of the bill and taxes it; but here the solicitor prefers to rest on his lien, and the assignee is driven to make this application. By the *Attorneys and Solicitors Act* (6 & 7 Vict. c. 73), s. 37, the Court may make an order subject to such conditions as the Court shall think proper. It is submitted that the terms suggested are consistent with justice. Here the solicitor has a security for his bill of costs. If that security is worth more than the amount of the bill he will be paid in full; if it is worth less, he ought not to be paid in full, but to receive a dividend only. At common law no undertaking is required: *Chitty's Archbold's* Practice (1). An order similar to that which I now ask was made in *Clarkson* v. *Parker* (2). If this application be refused, we shall be driven to file a bill to redeem the security, and then the bill must be taxed; if the security be worth less than the amount we shall not redeem, and the solicitor will be no better off then than he is now.

(1) Page 99. (2) 7 Dowl. 87.

Mr. *Jessel*, Q.C., for the solicitors, was not called on.

Lord Romilly, M.R.:—

It is quite plain that the assignee cannot obtain an order to tax this bill except upon an undertaking to pay it. *Clarkson* v. *Parker* (1) decides nothing more than this, that the assignee is entitled to a bill; the order referred to by Mr. *Ince* was discharged as to anything beyond that. The application must be refused with costs.

Mr. *Jessel* said there was a further objection, viz. that an assignee in bankruptcy was not entitled to an order to tax; but he was willing to waive it if an undertaking to pay were given.

Solicitors: Mr. *Spyer*; Messrs. *Elmslie, Forsyth, & Sedgwick*.

(1) 7 Dowl. 87.

V.-C. M. 1869 July 17, 24; Nov. 6; Dec. 21.

In re GENERAL PROVIDENT ASSURANCE COMPANY.

BRIDGER'S CASE.

Company—Contributory—Agreement to take Shares—Collateral Agreement—Taking Shares to deceive the Public.

4 Ch App Cas 353

B., the local agent of an insurance company, being requested by the manager to take shares in order to induce other persons to become shareholders, offered to apply for 100 shares on condition that he should not be called upon to pay anything for the shares, but that all payments on the shares should be deducted out of his commission on shares sold by him, and upon being told by the manager of the company that he would "be allowed the privilege of paying them up as convenient," he sent in a formal application for 100 shares, which were duly allotted to him, and he was informed of the allotment, and was registered as the holder of the shares; but he never paid any money on application or allotment, or any calls. He signed a proxy paper under a protest that it should not cancel his agreement as to the non-payments on his shares, and attended two meetings of the company. His commission was insufficient to pay for the shares:—

Held, that he had entered into an absolute contract to take the shares with a collateral agreement as to the effect of taking them, which did not prevent him being made a contributory:

Held, also, that having allowed his name to be registered as a shareholder to induce other persons to take shares, he was precluded from denying himself to be a contributory.

Affd by L. JJ. 5 Ch 305.

THIS was an application by the official liquidator to place the name of *William Bridger* on the list of contributories of the *General Provident Assurance Company, Limited*, now being wound up by the Court, for 100 shares. The matter had been adjourned into Court at *Bridger's* request, the Chief Clerk having decided against him.

On the 8th of September, 1866, *Bridger*, who was the district agent for the company at *Southampton*, and was paid partly by a fixed salary and partly by commission on shares disposed of by him, signed and sent in an application in the ordinary form for 100 shares; on the 26th of September the shares were allotted to him; and on the 3rd of October the allotment was notified to him. In July, 1867, a certificate of the shares was sent to him, for which he signed and sent to the company the following printed receipt:—

"I, the undersigned, hereby acknowledge that I have received one certificate, numbered 336, for 100 shares in the above company, numbered from 7805 to 7904 inclusive;" and his name was entered on the register as the holder of 100 shares.

According to the evidence of *Bridger*, and of *Heywood*, the manager of the company, *Heywood* had requested *Bridger* to apply for shares in the company in order that other residents in *Southampton* might be thereby induced to place confidence in the stability of the company, and to become shareholders; and *Bridger* had, on the 5th of September, 1866, written a letter to *Heywood* (which was not produced) offering to apply for shares on condition that he should not pay either the application or allotment money, or any call that might be made in respect of the shares, but that all moneys payable in respect of the shares should be deducted out of his commission; in answer to this letter *Heywood* wrote as follows: "I shall be most happy to receive your application for shares, allowing you the privilege of paying them up as convenient." *Bridger* thereupon sent in his application for shares, and with it a letter containing these words: "I inclose my own application for shares, which I propose to pay from my commission on shares as sold. My taking shares, I find, will strengthen my arguments in canvassing for business." *Heywood*, in a letter of the 10th of September, replied as follows: "Yours of the 8th is to hand containing your application for 100 shares. I hope your commission will soon amount up to enough to pay for them." There was no entry in the company's books of the agreement as to the payment of *Bridger's* shares, but *Heywood* stated that *Bridger's* proposal was agreed to by the directors; this, however, was denied by the secretary of the company.

Bridger did not pay any money on application or allotment, or any calls on the shares, and did not receive any dividends. In January, 1867, he received from the company a circular requesting payment of the arrears due in respect of his shares, and a letter from *Heywood* to the same effect; but upon his writing to *Heywood* a letter reminding him of the above arrangement, *Heywood* wrote to inform him that the circular and letter were sent to him by an oversight.

In February, 1867, *Bridger*, at *Heywood's* request, signed and

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sent to *Heywood* a proxy paper for voting at a general meeting of the company; but he sent with it a letter stating that he would only sign it on condition that he did not thereby cancel the agreement to allow him to pay calls from commission on shares sold. He also signed proxy papers in September, 1867, and January, 1868, and attended two meetings of the company, signing his name in the attendance book as the holder of 100 shares.

In July, 1867, the company's solicitor wrote to *Bridger* demanding payment of arrears, and threatening proceedings to recover them; but the secretary shortly afterwards wrote to say that the solicitor's letter was sent by an oversight.

Bridger subsequently wrote several letters repudiating the shares, but his name remained on the register when the company was ordered to be wound up.

Bridger's commission was not nearly sufficient to pay for his shares.

Mr. *Cotton*, Q.C., and Mr. *Higgins*, for the official liquidator:—

The transaction between *Bridger* and the company was an absolute contract that he should become the holder of 100 shares; and if there was any such agreement, as is alleged, that he should not be called upon to pay for the shares except by means of his commission, that was not a condition precedent to his becoming a shareholder, as in *Pellatt's Case* (1), but a collateral agreement as to the effect of his becoming a shareholder, as in *Elkington's Case* (2). *Bridger* admits that he applied for the shares for the purpose of inducing other persons who might see his name on the register to take shares, and he cannot be heard to say that he never was a *bonâ fide* shareholder. He knew that he was on the register, and if the shares had risen to a premium, he might, upon payment of the calls, have sold them. The non-payment of the deposit and allotment moneys does not affect the question whether he had agreed to be a shareholder: *Thomson's Case* (3); *Harrison's Case* (4); which are exactly like the present case. In *Simpson's Case* (5) and *Rogers' Case* (6) the application for shares was distinctly conditional.

(1) Law Rep. 2 Ch. 527.
(2) Ibid. 511.
(3) 34 L. J. (Ch.) 525.
(4) Law Rep. 3 Ch. 633.
(5) Ibid. 4 Ch. 184.
(6) Ibid. 3 Ch. 633.

The signing of a proxy paper is conclusive of the agreement to take the shares: *Langer's Case* (1).

Mr. *Glasse*, Q.C., and Mr. *Alexander*, for *Bridger* :—

In order to fix *Bridger* as a contributory it must be shewn that there was an unconditional offer by him to take shares, and an unconditional acceptance of the offer by the company: *Oriental Inland Steam Company* v. *Briggs* (2). But before sending in his application he distinctly made it a condition that the shares should only be paid for out of commission, and this offer was accepted by the directors; and with his application he sent a letter alluding to the condition, which letter must be taken as part of his application: *Rogers' Case* (3). Accordingly he was never called upon to pay anything on the shares; and when a circular was sent to him demanding payment the manager apologised for the mistake. If the directors had no power to allot him the shares on the terms of his offer the contract is void, and if they allotted the shares on any other terms that was not an acceptance of the offer: *Shackleford's Case* (4). The effect of signing the proxy paper is entirely got rid of by the letter in which he protested against its having the effect of cancelling the agreement. The fact of his name being on the register does not make him a shareholder if there was no complete contract: *Pellatt's Case* (5); *Simpson's Case* (6). In *Thomson's Case* (7) there was an unconditional acceptance of shares, and a subsequent offer by the company to let the shares be paid for out of commission.

Mr. *Cotton*, in reply.

In the course of the argument the VICE-CHANCELLOR suggested that *Bridger's* name should be taken off the list upon his withdrawing a claim which he had brought in against the company for arrears of salary, and that there should be no costs on either side. The official liquidator was ready to accept this compromise, but *Bridger* refused.

(1) 37 L. J. (Ch.) 292.
(2) 4 D. F. & J. 191.
(3) Law Rep. 3 Ch. 633.
(4) Ibid. 1 Ch. 567. See judgment of Vice-Chancellor *Wood* at p. 570, n.
(5) Law Rep. 2 Ch. 527.
(6) Ibid. 4 Ch. 184.
(7) 34 L. J. (Ch.) 525.

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Dec. 21. SIR R. MALINS, V.C.:—

This is an application by the official liquidator to put the name of *William Bridger* on the list of contributories of this company for 100 shares. In order to bind a person as a shareholder or contributory of a company it is sufficient to shew an application for shares, an allotment in consequence of such application, and a communication of the fact of allotment to the applicant. In the present case Mr. *Bridger*, on the 8th of September, 1866, signed an application for 100 shares in the ordinary form. In consequence of such application, 100 shares were allotted to him on the 26th of the same month, and the fact of the allotment was duly notified to him, and the usual certificate for the shares was forwarded to him, for which he signed and sent to the secretary of the company the following receipt: "I, the undersigned, hereby acknowledge that I have received one certificate, numbered 336, for 100 shares in the above company, numbered from 7805 to 7904 inclusive." These transactions are in themselves complete for fixing Mr. *Bridger* as a contributory, and throw on him the burden of proving that they do not represent the real transaction between himself and the company. That burden he attempts to discharge thus: he says that he took the shares conditionally upon, or in consequence of, being appointed the agent of the company at *Southampton*, and that it was agreed that the shares were to be paid for by means of his commission upon the disposal of shares, and not otherwise. [His Honour then went through the evidence, observing that in *Heywood's* letter of the 7th of September, 1866, the expression "allowing you the privilege of paying them up as convenient" made no allusion to commission; that *Bridger*, in his letter of the 8th of September, used the expression "my taking shares" without adding the word "conditionally"; that *Heywood's* letter of the 10th of September shewed that it was expected that *Bridger's* commission would be sufficient to pay for his shares; that there was no communication from the company, except through *Heywood*, recognising *Bridger's* right to be treated as anything but an ordinary shareholder, but that *Bridger* throughout asserted that he was not liable as a shareholder except so far as his commission would pay for his shares; that *Heywood's* evidence was inconsistent with his letter of the 17th of January, 1867, demanding payment of the

arrears on *Bridger's* shares, and continued:—] Upon this evidence the same question arises which is stated by Lord *Cairns* in his judgment in *Elkington's Case* (1). [His Honour read the passage commencing "Now it seemed to me" . . . and ending "over these shares," and continued:—] Here the only ingredient wanting was the payment of the deposit and calls, and this has frequently been held to be unimportant where the other circumstances exist. I think *Thomson's Case* (2) is nearly on all fours with the present case. There *Thomson*, upon his appointment as agent to an assurance company, agreed to take shares upon the terms that the payment for them should be deducted from his commission as agent, and no deposit was ever paid by him upon them, but he was registered as the holder of the shares. The company, very soon after his appointment, dismissed him. On the winding up of the company the question arose whether he was a contributory in respect of these shares. The Master of the Rolls thought that the agreement to employ him as agent was so mixed up with the agreement to take shares that he took his name off the list, but the Lords Justices took a different view, and held that there had been a binding agreement on *Thomson's* part to become a shareholder, and that the cancellation of the agreement to employ him as agent did not put an end to the agreement to take shares. *Harrison's Case* (3) is much to the same effect. In *Langer's Case* (4) it was held that the signature of a proxy, stating that the signatary was the owner of the shares, was decisive proof of his agreement to become a shareholder. Here also we have the signature of a proxy. These cases shew that Mr. *Bridger* must, according to the rule laid down by Lord *Cairns* in *Elkington's Case*, be considered as having intended and agreed to become a member or shareholder of this company *in præsenti*, with a collateral agreement as to what should be the effect of his becoming so.

I must add that the statement of *Bridger* himself as to the object for which he became, as he says, a nominal shareholder, disentitles him, in my opinion, to any relief. The deliberate representation to others that he was a shareholder, when, according to his own view, he was not really a shareholder, for the purpose of

(1) Law Rep. 2 Ch. 511, 522.
(2) 34 L. J. (Ch.) 525.
(3) Law Rep. 3 Ch. 633.
(4) 37 L. J. (Ch.) 292.

V.-C. M. 1869 — BRIDGER'S CASE.

inducing them to take shares, was a false representation, according to his own statement of his case, which, as between him and the other shareholders, precludes him from the right to deny that he was what he represented himself to be.

As to the authorities relied on by Mr. *Bridger's* counsel, *Shackleford's Case* (1) was a clear case of conditional contract; so also were *Rogers' Case* (2) and *Pellatt's Case* (3); and *Oriental Inland Steam Company* v. *Briggs* (4) turned upon an absolute offer being accepted with conditions.

Upon the whole case I think that Mr. *Bridger's* defence fails, and that he must consequently be put upon the list for 100 shares. I made a suggestion that his name should be taken off upon his withdrawing his claim against the company, and that he should neither pay nor receive costs. That suggestion was accepted by the liquidator, but was refused by Mr. *Bridger*. I should have been glad to spare him from paying costs, but, upon principles of public policy, I think that people should be taught that they must not deceive the public, and on that ground I am disposed to make him pay costs. He has chosen to have the matter adjourned into Court, and he must pay the costs of the adjournment into Court.

Solicitors for the Official Liquidator: Messrs. *Kimber & Ellis.*
Solicitor for the Respondent: Mr. *Joel Emanuel.*

V.-C. M. 1869 — Dec. 20.

In re BRADFORD NAVIGATION COMPANY.

Company—Winding-up Petition—Locus standi of Respondents.

Where the circumstances require it, the Court will hear in opposition to a petition to wind up a company, persons who are neither creditors nor contributories.

Upon a Petition to wind up a canal company, presented by the company, the corporation of a town within which part of the canal was situated, and a canal company whose canal communicated with that of the petitioning company, were heard in opposition to the Petition.

THIS was a Petition for the winding up of the *Company of Proprietors of the Bradford Navigation*, a company incorporated by Act of Parliament in 1771.

(1) Law Rep. 1 Ch. 567.
(2) Ibid. 3 Ch. 633.
(3) Law Rep. 2 Ch. 527.
(4) 4 D. F. & J. 191.

The water of the canal having become foul in consequence of the pollution of the stream from which it was derived, the company had been restrained by an injunction of the Court of Chancery (1), from allowing to pass into the canal, or collecting, or keeping, or continuing therein any polluted matter or water so as to be a public nuisance, and had consequently, since the 1st of May, 1867, ceased to take water from the polluted stream, and had emptied and disused the canal. The Petition, which was presented by the company, and was not served on any person, alleged that the company could not obtain a supply of water from any other source than the polluted stream except at a ruinous expense.

Part of the canal was situated within the town of *Bradford*. It communicated with the *Leeds and Liverpool Canal*, and the latter canal communicated, at a distance of thirteen miles from its junction with the *Bradford Canal*, with the *Aire and Calder Canal*.

The Act under which the company was incorporated empowered all persons to use the canal upon payment to the company of the rates and duties authorized by the Act.

The Corporation of *Bradford* and the *Aire and Calder Canal Company* appearing by counsel to oppose the Petition, the Petitioners' counsel objected that they had no *locus standi*.

Mr. *Pearson*, Q.C., and Mr. *Hastings*, for the Petitioners:—

No one has a right to be heard in opposition to a Petition to wind up a company, except creditors and contributories. This is clearly implied by the *Companies Act*, 1862, sects. 82, 85, 89, and 91, which provide that petitions must be presented, and applications for the staying of actions and suits against the company, for the appointment of provisional liquidators, and for the stay of proceedings in the winding-up, must be made, by the company or by creditors or contributories, and that the Court may have regard to the wishes of creditors and contributories, and call meetings to ascertain their wishes; and the 5th rule of the General Order under the Act, which entitles every creditor or contributory to be furnished with a copy of the winding-up Petition, supports this view. These Respondents have no more interest in this matter than the public in general, and the public can only be represented

(1) See *Attorney-General* v. *Proprietors of Bradford Canal*, Law Rep. 2 Eq. 71.

V.-C. M. 1869 — *In re* BRADFORD NAVIGATION COMPANY.

by the Attorney-General. If they are entitled to be heard, every inhabitant of *Bradford*, and every person who may possibly use the canal, or who may consider that his trade will be injured by the stopping of the canal, might also be heard.

Mr. *Cole*, Q.C., and Mr. *Freeling*, for the Corporation of *Bradford*, and Mr. *Glasse*, Q.C., and Mr. *Streeten*, for the *Aire and Calder Canal Company*, were not called upon.

SIR R. MALINS, V.C.:—

This is an application to wind up a company established by Act of Parliament for the purpose of making a canal through the large and important town of *Bradford*. It appears that, for reasons which may be perfectly good and sufficient, the company, who are the Petitioners, desire to be wound up; the Petition has not been served on anybody, and if there are no creditors or contributories who object, there will be no one to oppose it except the Court. All these cases must depend upon their own special circumstances; in this case the canal runs through the town of *Bradford*, and it communicates with the *Leeds and Liverpool Canal*, which again, at a distance of thirteen miles, communicates with the canal of the *Aire and Calder Company*, so that the three canals must be considered as forming a continuous line of communication. Under these circumstances, I think it is plain, that, though they may not come strictly within the words of the Act, as either creditors or contributories, I must hear both the corporation and the *Aire and Calder Company*, if they choose to appear and oppose the Petition.

[The Petition was then opened, but was eventually ordered to stand over with a view to an arrangement.]

Solicitors for the Petitioners: Messrs. *Evans & Foster*.
Solicitors for the Respondents: Mr. *Cann*; Mr. *Darley*.

WALTERS *v.* WEBB.

V.-C. M.
1869
Nov. 15, 17.

Copyholds—Seizure quousque—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27).

The bill stated that certain copyhold lands were in the possession of the Plaintiff's grandfather, who was entitled in fee simple by descent, but had never been admitted tenant on the Court rolls, and that prior to 1831, when the grandfather died, the lord of the manor, after the usual proclamations, had duly seized the lands *quousque*, no person having claimed to be admitted. The Plaintiff alleged that he was the customary heir, and prayed that the lord might be decreed to admit him as tenant on the Court rolls, upon payment of the fines due:—

Held, upon demurrer, that this was in effect a bill for the recovery of land, and that the Plaintiff, or those under whom he claimed, having been out of possession for more than twenty years, the *Statute of Limitations* (3 & 4 Will. 4, c. 27) was a bar to the Plaintiff's claim.

Demurrer allowed.

THE bill was filed by *William Walters* against the lords of the manor of *Wentsland*, in the county of *Monmouth*. It alleged that the Plaintiff was entitled to be admitted as tenant in fee simple, according to the custom of the manor, to certain lands and tenements, portion thereof. For many years previously to the year 1819, and down to the time of the seizure thereinafter mentioned, *W. Walters*, the grandfather of the Plaintiff, was in possession of and entitled, as tenant in fee simple, according to the custom of the said manor, to the lands in question. *William Walters* had never been admitted as tenant of the manor, but being in such possession, and being so entitled as aforesaid, the then lord of the manor caused successive proclamations to be made for the heir, according to the custom, to come in and be admitted as tenant of the said lands and tenements, and no one having appeared to demand admittance thereto, the said lands and tenements were duly seized *quousque*, and thereupon an entry was made upon the Court rolls, from which it appeared that the said lands and tenements were thenceforth to be held in trust for the person or persons entitled to be admitted thereto as copyholders of the manor, and the same had ever since been so held. *W. Walters*, the grandfather, died in July, 1831, intestate, leaving *Charles Walters*, his only son and heir, him surviving, who thereupon became entitled to demand admittance to the lands and tenements in question. *Charles Walters*

V.-C. M. 1869 WALTERS v. WEBB

was a soldier, and was the greater part of his life beyond the seas, and never made any demand to be admitted to the lands and tenements. He died in 1864, leaving the Plaintiff, his eldest son, him surviving, and the Plaintiff thereupon became entitled to be admitted as a customary heir of the manor. On the 3rd of June, 1868, the Plaintiff made a formal demand in writing to be so admitted, and on the 23rd of the same month he appeared before the steward of the manor, and demanded personally to be admitted, at the same time offering to pay the proper fines due in respect of such admission, but the Defendants, the lords, by their steward, refused to admit the Plaintiff.

The bill prayed that the Defendants might be decreed to admit the Plaintiff as tenant, according to the custom of the manor, to the lands and tenements, the Plaintiff offering to pay to the Defendants what should be due in respect of such admission.

Four demurrers to the bill were put in by different Defendants.

Mr. *Wickens*, and Mr. *Cracknall*, for the first demurrer:—

The *Statute of Limitations* (3 & 4 Will. 4, c. 27) is a conclusive bar to the Plaintiff's claim. That statute applies to lands of every tenure, and to suits in equity, and it not only bars the remedy but takes away the right. It is not clear from the bill at what time the lords of the manor seized the property *quousque*, but it could not have been later than the death of *William Walters* in 1831; the Plaintiff therefore, and those through whom he claims, have been out of possession for at least thirty-eight years. As to the allegation of an express trust, a mere allegation that the Defendant is a trustee for the Plaintiff will not support a bill: *Jackson* v. *North Wales Railway Company* (1); *Steedman* v. *Marsh* (2). The bill does not state by whom the alleged declaration of trust was made, and a mere entry on the Court rolls that the land is held in trust for the persons entitled, would not entitle a person to claim admittance after being for more than twenty years out of possession. The defence of the statute may be raised by demurrer: *Bampton* v. *Birchall* (3).

[They also cited *Doe* v. *Trueman* (4).]

(1) 1 H. & T. 75.
(2) 2 Jur. (N.S.) 391.
(3) 5 Beav. 67.
(4) 1 B. & Ad. 736.

Mr. *Osborne*, Q.C., and Mr. *Riddle*, for the second demurrer:—

The Plaintiff does not allege disability. It is admitted that the land was seized *quousque*, that is, until some person should come in and claim, which must be within a year and a day. It cannot, at any rate, be a longer period than twenty years: *Watkins* on Copyholds (1).

Mr. *Bristowe*, Q.C., and Mr. *Kekewich*, for the third demurrer, cited *Scriven* on Copyholds (2).

Mr. *Glasse*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Bradford*, in support of the bill:—

The estate of the lord when he seizes *quousque* is in the nature of a trusteeship, and the lord holds the estate only as trustee until the heir comes in, which may be at any period. The heir is not prevented from claiming after any length of time. There can be no forfeiture upon a seizure *quousque* except by special custom. The lord can only hold the estate until the heir comes in and claims: *Doe* v. *Trueman* (3), where it is stated that: "If this were the case of a forfeiture, we should be of opinion that the succeeding lord could not avail himself of it. But it is not an absolute forfeiture, for, unless there be a custom in the manor that the copyhold shall be forfeited, the lord cannot seize as for an absolute forfeiture; he can only seize till the tenant comes in, as was finally decided in *Roe* v. *Hellier* (4);" and in *Doe* v. *Muscott* (5) it is stated, "Upon a seizure *quousque* there is no forfeiture." Again, in *Doe* v. *Harrison* (6) *Coleridge*, J., says that seizure *quousque* gives no adverse title if there is no time at which the statute can begin to run: *Mason* v. *Day* (7).

In *Watkins* (8) there is this passage: "What, then, is to be now understood by his seizing *quousque?* Is the heir to be absolutely unlimited in point of time, and by consequence the lord precluded from granting out the lands to any other person, and so to be robbed of his rights? Or are the year and a day to be computed from the last (or third) proclamation? But if so, by what

(1) 4th Ed. vol. ii. p. 76.
(2) 4th Ed. vol. i. p. 287.
(3) 1 B. & Ad. 736, 745.
(4) 3 T. R. 162.
(5) 12 M. & W. 832, 843.
(6) 6 Q. B. 631.
(7) Gilbert's Eq. Cases, 77.
(8) 4th Ed. vol. ii. p. 77.

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law is the time postponed?" There has been no forfeiture in this case: *Doe* v. *Wilkinson* (1). In *Dean of Ely* v. *Bliss* (2) Lord *Cottenham* held that the statute did not embrace the case of tithes, neither does this bill, which prays that the lord may admit service, come within the Act.

Besides this, we have a good ground of equity in the prayer in our bill, that the lord may be ordered to produce the Court rolls.

This is not a suit to turn any one out of possession, but merely to compel the lord to admit the Plaintiff upon the Court rolls. The Plaintiff tenders the lord his service and the fine to which he is entitled, and he has then a right to be placed in the position of his father. The bill, therefore, is not a bill to recover possession of land within the meaning of the statute: *Andrews* v. *Hulse* (3). Suppose the land were in possession of a third person and not of the lord, then the bill being to place the Plaintiff on the rolls of the manor, that could not be called a bill to recover land, since the Plaintiff, when once on the Court rolls, would have to take further steps against the person actually in possession to recover the land. The lord is a judicial officer as well as an owner of land, and he has a duty to perform to his tenants independently of his right to the ownership of the land. The bill therefore prays that the lord may be compelled to do his duty. No time would begin to run against the Plaintiff till he came in, in June, 1868, and claimed to pay his fines and perform service: *Chichester* v. *Hall* (4); *Pickett* v. *Packham* (5).

SIR R. MALINS, V.C.:—

By the allegations of the bill it appears that *William Walters* was entitled to and was in possession of this property sometime before 1831—the precise date is not stated, but at all events before 1831—but he had not paid the fines to which the lord was entitled, and therefore that the lord duly seized *quousque*, that is, until the fines should be paid. The date of that seizure is not given, but it must have been before 1831, because *William Walters*, in whose time this occurred, is stated to have died in 1831; and as the

(1) 3 B. & C. 413.
(2) 2 D. M. & G. 459.
(3) 4 K. & J. 392.
(4) 17 L. T. 121.
(5) Law Rep. 4 Ch. 190.

lord duly seized *quousque*, he could only have done so, as decided in *Doe* v. *Trueman* (1), after making three successive proclamations at three successive Courts. The lord being thus in possession, the bill states "that the said lands and tenements were thenceforth to be held in trust for the person or persons entitled to be admitted thereto as copyholders of the said manor." It is then stated that *William Walters* died, leaving a son *Charles*, who, I suppose, it is intended to be alleged became entitled to the property upon the death of *William;* that *Charles* is dead, and that the Plaintiff is one of his heirs, and as one of such heirs entitled to the copyhold property. To this bill four several demurrers have been put in, and the only question raised upon the demurrers is, whether, under the present state of circumstances, the Plaintiff is entitled to call upon the lord of the manor to admit him to this copyhold land. Now that a bill can be sustained in this Court to compel the lord of a manor to admit a copyholder, and that this Court has concurrent jurisdiction with a Court of Law, although the remedy is ordinarily by mandamus, was not denied by the learned counsel who have argued the case, nor could it be denied, because the point has been decided by the present Lord Chancellor in *Andrews* v. *Hulse* (2); and even if it had not been decided by him, I should have no doubt about it. In a proper case, therefore, and within the proper time, when the lord of the manor is in a situation that he ought to admit the tenant and refuses to do so, a bill can be maintained in this Court to compel the performance of that duty on his part. The sole question is, whether the lord or the lords of this manor are in that position that it becomes their duty to admit the Plaintiff as tenant upon the Court rolls. That raises a very material question. In my opinion there is no shadow of doubt whatever that in all questions of right to land the statute of 3 & 4 Will. 4, c. 27, is applicable, and no person can recover possession of land by process of this Court, or in any other Court, unless he can allege and prove that his title to the possession of that land accrued to himself, or the person under whom he claims, within twenty years before the institution of the suit. But in order to get over that difficulty, it is strenuously argued that this is not a suit for the recovery of land. I confess, although it was very much pressed

(1) 1 B. & Ad. 736. (2) 4 K. & J. 392.

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upon me, I am totally unable to see the force of that argument. The object of the suit is to compel the lord of the manor to admit this Plaintiff. Now, if the lord of the manor admits the Plaintiff, he, by admitting him, to all intents and purposes admits his title to the possession of the land, and all but puts him in possession, because directly he admits him as tenant on the Court rolls the tenant can recover in ejectment against him—the lord himself would be a trespasser by keeping his tenant on the Court rolls out of possession; and therefore if he can compel the lord to admit him, it is a mode of recovering possession of land. In fact, the argument resolves itself into this, the Plaintiff does not recover it, but the lord loses it, because undoubtedly he must lose it if he admits that he is no longer lawfully in possession. It has been argued, and I am surprised to hear such a thing gravely argued at the present day, that if the lord of a manor seizes copyhold *pro defectu tenentis*, not for a positive act of forfeiture, but where the tenant fails to perform his duty by paying the lord his fine and the steward his fees, that the lord being in possession under that seizure, the property may be recovered, not after the expiration of twenty years merely, but, if the argument is good for anything, after centuries. It is not necessary for me to give any opinion as to what the law was or would have been but for the statute of 3 & 4 Will. 4, c. 27, which is expressly made applicable to copyhold and customary lands; but this is abundantly clear, that the object of the Legislature—an object which, I think, is very distinctly carried into effect by the words of the statute—was this, that after the passing of the Act the expiration of twenty years, or of ten years from the removal of disability, is to be an absolute bar to the right of recovery; and in order to obviate the great inconvenience of a continued series of disabilities, by the 17th section no continued series of disabilities can carry the period beyond forty years. But the first question of all is, whether this is a process for the recovery of the possession of land? I am decidedly of opinion that it is. Can, then, a tenant who by himself and his ancestors has been out of possession as between him and the lord of the manor for more than twenty years, and it may be for centuries, recover possession of land by compelling the lord of the manor, either by mandamus or proceedings in

this Court, to admit him as tenant? The 2nd section of the statute to my mind disposes of the question beyond the slightest doubt whatever. It is this: that "After the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same." Now if it stopped there it might have been left indefinite; but then the statute goes on to define when the rights shall be deemed to have accrued. The 3rd section enacts that when the person claiming such land or rent, or some person through whom he claims, shall in respect of the estate or interest claimed have been in possession or in receipt of the profits, and shall while entitled thereto have been dispossessed or have discontinued such possession or receipt—it is not necessary to have a forcible dispossession or ousting, or adverse possession, as it is called in law—"then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received." Now, applying this, what is the estate or interest of *William Walters* in respect of which this claim is made? When was *William Walters* last in possession of the estate or interest as copyhold tenant in respect of which this claim is made? By the allegation in the bill the possession ceased on or before 1831, because it is quite clear that sometime in his lifetime this seizure *quousque* took place. Therefore, at all events, thirty-eight years ago, the person under whom the Plaintiff claims was last in possession of the estate or interest; that is, the estate of the copyhold tenant. Then, if he has been out of possession; that is, if he has been dispossessed, or has simply discontinued the receipt of the rents and profits for twenty years, that time is as fatal, in my opinion, as twenty centuries. It is in vain for any person to come here for the purpose of recovering possession of land of which he, or those under whom he claims, have not been in possession within the twenty years.

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Then it has been argued that the seizure *quousque* is not an adverse possession. It is perfectly immaterial whether it is an adverse possession or not. It is laid down by Mr. Justice *Coleridge* in *Doe* v. *Harrison* (1), that it is not an adverse possession. I quite agree that it is not like a dis-seizin, it is not like a violent ousting. It is a possession which the lord takes to hold until he gets his fees or fines. It is a thing which puts him in possession of the rents and profits of the estate, and which discontinues, in the language of the statute, the possession or receipts of the rents and profits by the opposite party. I put it to Mr. *Cotton*, that the case of the tenant holding over simply after the expiration of his tenancy is not an adverse possession; but, nevertheless, if a landlord allows twenty years to elapse without payment of rent or recognition of title, that is a fatal bar to the landlord, and just as fatal as if it had been an original dis-seizin or ousting by violence. Upon every principle, therefore, it appears to me that this is a suit for the recovery of land, and being so, the estate or interest in respect of which the claim was made was last in possession of *William Walters*, the grandfather of the Plaintiff, thirty-eight years ago—that is, more than twenty years ago. No disability is alleged, and twenty years is, in my opinion, a fatal bar to compelling the lord to admit the tenant.

The only other point necessary to be mentioned is that when the seizure *quousque* took place the entry upon the Court rolls was that the land was "to be held in trust for the person or persons entitled to be admitted thereto." Some attempt was made to bring the case under the 25th section of the Act, which provides, that where there is an express trust, time does not run till certain things are done which are not alleged to be done in this case; that is, a sale, and so forth. But even if it were an express trust, for whom is it an express trust? "For the person or persons entitled to be admitted thereto." It leaves the case exactly where it was; in order to recover here the Plaintiff must shew himself to be the person entitled to be admitted.

For the reasons I have stated, I am of opinion that the Plaintiff has entirely failed to prove that he is entitled to be admitted, and, therefore, upon the broad ground that whether it is between land-

(1) 6 Q. B. 631.

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lord, copyholder and tenant, or any other persons whatever, directly it is shewn that there has been a discontinuance, in the language of the statute, of the receipt of the rents and profits for twenty years without disability, there being nothing to take the case out of the statute, that is a fatal bar to all persons seeking possession of the land.

The demurrers, therefore, must be allowed. With regard to the case of *Chichester* v. *Hall* (1), it is merely that there had not been a heriot paid upon the death of one tenant; but the lord might have forgone his heriot, or otherwise. That is the nature of the case. It has nothing to do with this. With regard to *Pickett* v. *Packham* (2), there being a demise shewn to have been acted upon for two centuries after it was created, the Court treated that as a leasehold.

Solicitors for the Plaintiff: Messrs. *Rooks, Kenrick, & Harston.*

Solicitors for the Defendants: Mr. *H. White;* Messrs. *Ward, Mills, & Witham;* Messrs. *Freshfield.*

In re HEATON STEEL AND IRON COMPANY.

V.-C. M. 1869 Nov. 18.

SIMPSON'S CASE.

Company—Rectification of Register—25 & 26 Vict. c. 89, s. 35.

Upon motion under the 35th section of 25 & 26 Vict. c. 89, to rectify the register of a company by striking off certain shares:—

Held, that the case was one of so much doubt and difficulty, involving as it did the disputed construction of documents, that the Court could not make an order under the summary powers of the 35th section. Motion refused without prejudice to a bill being filed.

THIS was a motion under the 35th section of the Act 25 & 26 Vict. c. 89, on behalf of *John Simpson*, that the *Heaton Steel and Iron Company, Limited*, might be ordered to rectify the register of shareholders of the company by striking out therefrom the name of the said *John Simpson* so far as regarded 1708 preference shares in the company, which were purported to have been allotted to him on the 28th of June, 1869, and so appeared on the register.

The *Heaton Steel and Iron Company* was incorporated on the 4th of November, 1868, with a nominal capital of £400,000, con-

(1) 17 L. T. 121. (2) Law Rep. 4 Ch. 190.

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sisting of 10,000 preference shares and 30,000 ordinary shares, which latter were treated as fully paid-up shares.

On the same 4th of November, 1868, a provisional contract between the *Heaton Company* and a company called the *Langley Mill Steel and Iron Works Company* was entered into for the purchase by the *Heaton Company* from the *Langley Mill Company* of the freehold hereditaments, buildings, plant, implements and effects of the last-named company at the price of £34,000.

The contract contained a proviso "that, in case on or before the 1st day of July, 1869, there should not be allotted to and registered in the books of the said *Heaton Company* in the names of responsible parties as members of the same company, according to the statutes in force in that behalf, at least one-fourth of the said 10,000 preference shares of the said company it should be lawful for either of the said companies or their successors, by notice in writing to the other of them given on or within ten days after the said 1st day of July, 1869, to determine the contract without prejudice nevertheless to any then existing right of action on either side, but otherwise the contract should remain and be in full force and virtue, notwithstanding that the whole of the shares of the said company should not be subscribed for or allotted."

During the negotiations which led to the execution of this provisional contract, it was arranged between the directors of the *Langley Mill Company* and the promoters of the *Heaton Company* that, in case such contract should be carried into effect, such of the shareholders in the *Langley Mill Company* as were willing so to do should accept shares in the *Heaton Company* equivalent in nominal value and calculated as paid up to the same amount as the shares held by them in the *Langley Mill Company*, and that such shares should, on the completion of the sale, be accepted in part payment of the said purchase-money of £34,000.

For the purpose of obtaining the consent of the shareholders to this proposed arrangement, the directors of the *Langley Mill Company* caused the following undertaking to be prepared for the signature of the shareholders thereof: "I, the undersigned, as shareholder of the *Langley Mill Company, Limited*, do hereby consent to the directors of the company negotiating and completing the sale and transfer of the effects and assets of the company to a

new company about to be formed upon the terms that such new company shall either discharge the liabilities of the company, or pay a sum sufficient to enable the directors to do so, and allot to the shareholders in the above-mentioned company shares in the new company equivalent in nominal value and calculated as paid up to the same amount as the shares held by them in the above company, or upon such modification of the above terms as the directors may think reasonable; and upon such shares being allotted to me, I undertake to execute such transfer of my shares in the said company as shall have been agreed upon between the directors and the new company or the directors thereof."

This undertaking was signed by all the shareholders in the *Langley Mill Company*, and at the same time *John Simpson*, as the chairman of the *Langley Mill Company*, signed the following undertaking, which was also dated the 4th of November, 1868, and addressed to the directors of the *Heaton Steel Company*: "Gentlemen,—In consideration of your agreeing at my request to affix the seal of your company to a provisional contract dated this day, and made between the *Langley Mill Iron and Steel Company, Limited*, of the one part, and the *Heaton Steel and Iron Company* of the other part (such contract providing for the purchase by the last-mentioned company of the whole of the freehold hereditaments, plant, tools, utensils, and manufacturing implements and effects of the *Langley Mill Iron and Steel Company* for the sum of £34,000 payable at the times and in manner mentioned in such contract), I hereby undertake and agree that the persons mentioned in the schedule to this undertaking who are respectively at the present time shareholders in the *Langley Mill Company* shall apply for preference shares in the *Heaton Steel and Iron Company, Limited*, to the same nominal amount as their present holdings. And for the considerations aforesaid, I hereby undertake and agree, in the event of the shareholders to whom I have referred not making such applications, I will myself apply for and take an allotment of the said shares, it being understood that 644 of such shares are when issued to be credited with the sum of £10 per share, and 1064 when issued to be credited with the sum of £6 a share, and that the *Langley Mill Steel and Iron Works Company, Limited*, shall give credit to the *Heaton Steel and Iron Company, Limited*, for the

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aggregate amount of the said preference shares so to be allotted as aforesaid as against the balance of the sum of £34,000, being the purchase-money hereinbefore referred to."

John Simpson also signed the memorandum of association of the *Heaton Company*, and thereby became a director thereof; and on the 26th of June, 1869, he received the following notice from the *Heaton Company* signed by *James Malley*, the secretary:—

"Sir,—I have the honour to inform you that the directors have, in pursuance of the terms and stipulations contained in your undertaking, given to the directors of this company, dated the 4th of November, 1868, allotted to you 1708 preference shares in the above-named company, upon 644 of which shares you are credited with the sum of £10 per share, and I am instructed to request that you will pay the amount of £4 per share upon 1064, being the remainder of the shares, in respect of which you are credited with £6 per share, into the hands of the company's bankers.

"Due notice will be given when the bankers' receipts can be exchanged for share certificates."

On the following day *John Simpson*, through his solicitors, repudiated the above allotment, and alleged that he had not applied for any shares in the company, and had given no undertaking which justified the directors in allotting to him the shares in question. He therefore refused to accept such shares, or to comply with the request contained in the above letter.

It appeared, upon inspection of the register of shareholders, that on the 28th of June Mr. *Simpson's* name was entered as the holder of 1708 shares, and the total number of shares purported to have been allotted and registered, exclusive of the said 1708, was 2470 and no more.

On the 8th of July the *Langley Mill Company* gave notice to the *Heaton Company* to rescind the contract of the 4th of November, on the ground that the requisite number of shares had not been allotted and registered by the *Heaton Company*.

Mr. *Cotton*, Q.C., and Mr. *C. T. Simpson*, in support of the motion to rectify the register by striking out the name of Mr *Simpson*, as regarded the 1708 shares:—

In the first place, the allotment was made to Mr. *Simpson* on

the 26th of June, 1869, and the shares were actually entered upon the register on the 28th of June, which was before the contract was complete, for by the terms of that contract the stipulation was that the shares should be taken up on or before the 1st of July. The undertaking of Mr. *Simpson* could not, therefore, have been intended to take effect till after the 1st of July. The next ground is, that if the shares were to be taken at all by Mr. *Simpson*, they were not to form part of the specified minimum number of shares. The contract was distinct from the undertaking, and the contract not having been performed by the taking up of a fourth part of the shares, either company had a right to give notice to rescind. It being then in the power of either company within ten days after the 1st of July, to give notice to determine the contract, it was not, at the time the shares were allotted to Mr. *Simpson*, a positive contract which could have been enforced against him. Another ground is, that the company had no power to issue these preference shares without special resolutions; and, moreover, in this case there never was an allotment of shares to Mr. *Simpson* by an issue of certificates, without which his name could not be placed on the register. This was decided in *East Gloucestershire Railway Company* v. *Bartholomew* (1).

Mr. *Glasse*, Q.C., and Mr. *Cracknall*, for the *Heaton Steel and Iron Company*:—

The first objection to this motion is, that it cannot be made upon a summary application under the 35th section of the Act of 1862. The question is one of a difficult and intricate nature, and it was never intended in such a case that the Court should exercise a summary power to take the name of a shareholder off the register. This was decided in the case of *National and Provincial Marine Insurance Company* (2), and *Ward and Henry's Case* (3). Even under the old practice, before the *Companies Act*, the Court was always unwilling to decide questions of this difficult nature upon interlocutory applications: *Bullock* v. *Chapman* (4); *Re British Sugar Refining Company* (5). Under any circumstances this ques-

(1) Law Rep. 3 Ex. 15
(2) Ibid. 2 Ch. 685.
(3) Law Rep. 2 Ch. 431.
(4) 2 De G. & Sm. 211.
(5) 3 K. & J. 408.

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tion cannot be decided without having the *Langley Mills Company* before the Court. Mr. *Simpson* was the manager of the *Langley Mills Company* and director of the *Heaton Company*, and the contract for the sale of the *Langley Mills Company* was to be carried out under his superintendence. He therefore took upon himself the burthen of inducing the shareholders in the *Langley Mills Company* to take up a certain number of shares, and if not, then he undertook to apply for and take up the 1708 preference shares It is evident that these shares were to be taken by him expressly for the purpose of making up the requisite number of shares. This is, in fact, an ingenious mode of preventing the contract from being carried into effect; because if these shares are not to be included the power to rescind comes into effect.

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.:—

This is an application by Mr. *Simpson* under the summary powers given by the 35th section of the Act of 1862 (25 & 26 Vict. c. 89), that the register of shareholders of the company may be rectified by striking out his name as the holder of 1708 shares. This is not the case of a company ordered to be wound up, but the application is rested on the ground that Mr. *Simpson's* name has been improperly placed upon the register in respect of these shares, and ought therefore to be taken off. Now, certainly the Court has, under this section, a very extensive power, but the authorities have settled the construction of it to be, that it can only be applied in cases which are clear and free from complication. Is this, then, a case of that description?

The transaction under which the question arises is this:—On the 3rd of November, 1868, the *Heaton Steel and Iron Company* was formed for the purpose of working *Heaton's* process of manufacturing steel, with the usual memorandum and articles of association. *John Simpson* was a director of the *Heaton Company*. There was another company called the *Langley Mills Ironworks Company*, of which Mr. *Simpson* was chairman, and it is impossible not to see that the arrangement for the purchase of the *Langley Mills Company* by the *Heaton Company*, and the formation of the latter company, was all one and the same transaction.

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By a contract dated the 4th of November, 1868, the *Langley Mills Company* were to sell their concern to the *Heaton Company* for a considerable sum of money, £34,000, and the *Heaton Company* being formed only the day before, the contract would be an absolute nullity unless they got the shares taken, and therefore the provision was not unreasonable, that if by a certain time, that is the 1st of July, 1869, there should not be allotted by the *Heaton Company*, to responsible parties, one-fourth of 10,000 preference shares, it should be lawful for either company, or their successors, by notice within ten days, to withdraw. This was on the 4th of November, and on the same day *John Simpson* gave this undertaking to the directors of the *Heaton Company*, that in consideration of their agreeing at his request to affix the seal of the company to a provisional contract between the companies, such contract providing for the purchase by the *Heaton Company* of the *Langley Mills Company* for £34,000, he agreed that the persons mentioned in the schedule of that undertaking—then shareholders of the *Langley Mills Company*—should apply for preference shares in the *Heaton Company* to the same nominal amount as their then holdings, and he undertook and agreed, for the consideration aforesaid, that in the event of the shareholders not making such application he would himself apply for and take an allotment of the shares; 644 to be credited with £10 per share, and 1064 with £6 per share, the *Langley Mills Company* to give credit to the *Heaton Company* for the aggregate amount of the shares as against the £34,000 purchase-money. This was signed by *John Simpson*. On the 26th of June, very close indeed upon the time mentioned in this undertaking with reference to the power of rescinding the contract if 2500 shares were not applied for, the *Heaton Company*, finding the shares not taken, and being anxious that the *Langley Mills Company* should not rescind the contract (the *Langley Mills Company* having received £7000 odd for deposit), put *John Simpson's* name on the list for 1708 shares, and if it was rightly put on, the 2500 shares required by the proviso were made up, but if not, then there was a right to rescind on the part of the *Langley Mills Company*. The *Langley Mills Company* I must regard as put in action by *Simpson*, and they, taking the view that without the 1708 shares allotted to *Simpson* the right

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number of shares had not been made up by the *Heaton Company*, gave notice on the 8th of July to rescind the contract. I cannot sever *Simpson* from these proceedings of the *Langley Mills Company*, and if the meaning of the undertaking was that the 1708 shares were to be included in the 2500, then, I think, this is a most unfair attempt to vitiate the contract under the proviso. But if Mr. *Simpson* and the *Langley Mills Company* have taken a right view of the contract, then the 1708 shares were to be reckoned in addition to those applied for. The question is, whether it is so clear that *Simpson* was not to take the shares, that I can on this summary application decide that he has a right to have his name taken off, and that in the absence of the *Langley Mills Company*. It is not impossible that they may now desire to sustain the contract, and that on bill filed they might succeed in sustaining it. The interest of the *Langley Mills Company* is to have as many shareholders as they can to concur; is it then a question in which the *Langley Mills Company* have no interest? They are not before the Court, and I had rather not express a final opinion, but, so far as I can judge at present of the whole transaction, I should be of opinion that the true meaning of the affair was that *Simpson* himself, who was the moving spirit, was to put the company in possession of a valuable contract by contributing 1708 shares, and if so, an attempt to vitiate that is unsustainable; at any rate the motion cannot succeed, and, so far as I have heard, my opinion is against *Simpson*. It is a complicated, difficult, and doubtful question, and not one in which I am justified, after the decision in *Ward* and *Henry's Case* (1), to make an order under the 35th section. In *Musgrave and Hart's Case* (2) I was obliged to come to a conclusion contrary to my own judgment, which was that the 35th section ought to receive a liberal interpretation. I am bound in this case to leave the parties to file a bill. It is not a case which I could think of deciding, but if I were to do so it would be against *Simpson*. It must be without prejudice to filing a bill.

Solicitors for the Applicant: Messrs. *Risley & Stoker*.
Solicitor for the Company: Mr. *W. T. Manning*.

(1) Law Rep. 2 Ch. 431.

(2) Law Rep. 5 Eq. 193.

In re ASHMORE'S TRUSTS.

V.-C. J.
1869
Dec. 4.

Will—Construction—Gift to Issue "on their attaining Twenty-one"—Intermediate Gift of Income "to be applied in or towards" their Maintenance and Education.

Testatrix gave a share of residuary personal estate to such of her four grandchildren (naming them) as should be living at the death of *M. A. H.*, and directed that in case any of her said four grandchildren should die in the lifetime of *M. A. H.* leaving issue, the share or shares of such of them so dying should be assigned and transferred to such issue respectively, in equal shares and proportions, "on their attaining the age of twenty-one years and the dividends and proceeds thereof in the meantime to be applied in or towards their maintenance and education."

One of the grandchildren having died in the lifetime of *M. A. H.*, leaving issue, of whom several died under twenty-one :—

Held, that the interests of such of the issue of the grandchild as died under twenty-one did not vest at the death of their parent, but that the share vested in such of the issue only as attained twenty-one.

Not followed Fox v Fox LR 19 Eq 286

PETITION.

Elizabeth Ashmore, widow, by her will dated the 14th of May, 1844, bequeathed all her residuary personal estate to trustees upon trust to assign and transfer a leasehold house as therein mentioned; and further upon trust, after the decease of her daughter, *Mary Ann Hopkins*, to assign, transfer, and pay £1000 (part of her said estate), or the investments thereof, and all other her moneys, estate, and effects, unto and equally between such of her four grandchildren, *James Joseph Hopkins, George Thomas Hopkins, Elizabeth Hopkins*, and *Robert Hopkins*, as should be living at the decease of her (testatrix's) said daughter, and as should then have attained or should thereafter live to attain the age of twenty-one years; and in the meantime to apply the dividends and annual proceeds of the share or shares of such of them as should be under the age of twenty-one years, or so much thereof as might be necessary, in or towards his, her, or their maintenance and education.

Testatrix then continued as follows :—

"Provided, and my will is, that in case any of my said four grandchildren shall die in the lifetime of my said daughter leaving lawful issue them, him, or her surviving, the share or shares of

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such of them so dying shall be assigned and transferred to such issue respectively, in equal shares and proportions, on their attaining the age of twenty-one years, and the dividends and proceeds thereof in the meantime to be applied in or towards their maintenance and education."

Testatrix died on the 13th of November, 1850.

Mary Ann Hopkins, the daughter, died on the 31st of August, 1859. At that date one of the grandchildren, namely, *Elizabeth Andrews*, formerly *Hopkins*, was dead.

Elizabeth Andrews had had four children, namely, the Petitioner, *Edward*, who was born on the 2nd of July, 1848; *Elizabeth*, who was born on the 27th of February, 1850, and who died in 1851; *Mary Ann*, who was born in 1851; and *Emma*, who was born in 1852.

Since the death of *Mary Ann Hopkins*, *Mary Ann* and *Emma Andrews* had both died infants, leaving the Petitioner *Edward Andrews* the sole survivor of the issue of *Elizabeth Andrews*.

The Petitioner attained twenty-one on the 2nd of July, 1869; and the question now between him and his father, who had taken out administration to the infants, or some of them, was, whether the interests of the infants in their mother's share vested at the death of their mother, or whether such share vested in the only one of the issue who lived to attain twenty-one.

The surviving trustee of the will having paid Mrs. *Andrews'* fourth share into Court, the Petitioner now prayed that it might be paid out to his solicitor.

Mr. *Hardy*, Q.C., and Mr. *Byrne*, for the Petitioner:—

A gift to a person "on his attaining twenty-one" is plainly contingent; the only question that arises is upon the clause as to maintenance.

If the income of the share had been given to the issue "until" they should attain twenty-one, that would clearly have vested the share; but we contend that a mere gift "in or towards maintenance and education" has no such effect as this. Until the attainment of twenty-one there is no gift, except to such of the issue as may be actually in enjoyment of the maintenance and education.

In *Hanson* v. *Graham* (1), where the legacies were held to vest

(1) 6 Ves. 239.

at the testator's death, the gift was a gift of stock to grandchildren "when" they should attain twenty-one, with an intermediate gift of the whole income of the stock; but a distinction is taken where the intermediate gift is only of an allowance for maintenance, although such allowance may be equal in amount to the interest: *Leake* v. *Robinson* (1); *Watson* v. *Hayes* (2). The only authority to the contrary is *Eccles* v. *Birkett* (3); but the reasons for that judgment are not reported, as was observed by Vice-Chancellor *Malins* in *Locke* v. *Lamb* (4).

The gift here is not for the "benefit" of the issue generally; but for their "maintenance" generally; and no intention can be shewn to give the whole income to those who should be under age for the time being. A gift of maintenance out of income does not amount to a presumption that a gift of the whole income was intended: *Pulsford* v. *Hunter* (5); *Leake* v. *Robinson*; *Livesey* v. *Livesey* (6). The trustees in this case have a discretion.

[The following cases were also referred to: *In re Hunter's Trusts* (7); *Lloyd* v. *Lloyd* (8); *Tracy* v. *Butcher* (9); *Taylor* v. *Bacon* (10).]

Mr. *Everitt*, for the Respondent, the administrator of the infants:—

The testatrix has used two different forms of expression. In the former gift she says, "so much of the income as may be necessary," in the latter "the dividends and proceeds thereof." The inference is, that in the second instance she meant to give the whole.

This is not an allowance for maintenance out of income as in *Watson* v. *Hayes*; it is a gift of the income itself.

The Court always leans in favour of vesting.

The latter gift of income is not discretionary, as the former was. When one of the infants died, the trustees were then to hold the income of the share in trust for the personal representatives of the infant.

Eccles v. *Birkett* has not been overruled.

(1) 2 Mer. 363.
(2) 5 My. & Cr. 125.
(3) 4 De G. & Sm. 105.
(4) Law Rep. 4 Eq. 372, 378.
(5) 3 Bro. C. C. 416.
(6) 3 Russ. 287.
(7) Law Rep. 1 Eq. 295.
(8) 3 K. & J. 20.
(9) 24 Beav. 438.
(10) 8 Sim. 100.

V.-C. J. 1869 *In re* SHMORE'S TRUSTS.

SIR W. M. JAMES, V.C.:—

I think, on the whole, I cannot distinguish this case from *Pulsford* v. *Hunter* (1). My first impression was the other way, but *Pulsford* v. *Hunter* seems to me to be exactly the same case with a slight alteration of the order of the words.

In *Pulsford* v. *Hunter* a testator, after giving two annuities, enumerated some sums of stock then in his possession, and proceeded as follows: "the interest of the remainder part to be applied for the use and education of my grandchildren till they arrive at the age of twenty-one years, and the principal to be then equally divided amongst them;" and the Lord Chancellor (Lord *Loughborough*) thought that however it might be where interest was given, yet that the giving maintenance was a different case, and was not equivalent to giving interest.

In this case the fund is given to the issue on their attaining twenty-one, and the dividends and proceeds in the meantime are to be applied in or towards their maintenance and education.

I am really not able substantially to distinguish these two cases.

I think it very probable that the decision may be sustained by another consideration—namely, that this is a gift not of a separate share to each of the issue on attaining twenty-one, with a gift of the dividends and proceeds thereof in the meantime to be applied in maintenance; but a gift of a fund to each of the issue on attaining twenty-one in equal shares and proportions, and a gift of the dividends and interest in the meantime.

In this respect the case is exactly that of *Pulsford* v. *Hunter*. That authority has never been questioned, and certainly never overruled.

There will be a declaration to the effect that the interests of those of the issue who died under twenty-one passed to the survivors.

Solicitors: Messrs. *Boulton & Sons.*

(1) 3 Bro. C. C. 416.

BAKER *v.* WAIT.

V.-C. J.
1869
Dec. 11.

Jurisdiction in Equity of County Courts—In what Court Proceedings to be taken —Transfer of Plaint to Court of Chancery—County Courts Acts, 1865, *ss.* 1, 3, 9, 10; *and* 1867, *s.* 1.

Where a plaint had been filed in a County Court against five Defendants, of whom one only, who was in the Plaintiff's interest, had a residence in the County Court district, all the others being resident in other districts, the plaint was ordered to be transferred to the Court of Chancery.

THIS was a summons on behalf of *William Piguenit Wait* and *Alice Agnes Wyld*, his wife, *Benjamin Baylis Garrard*, and *Albert Prowse*, who, together with *James William Roxworthy Brooks*, were Defendants to a plaint in equity filed by *Charles Baker* in the County Court of *Gloucestershire*, held at *Bristol*, that the plaint might be transferred from the County Court to the Court of Chancery.

The object of the plaint was to charge the separate estate of Mrs. *Wait* with a sum of money alleged to be due to the Plaintiff from the Defendant *Brooks*, and to be secured by the promissory note or bill of exchange of Mrs. *Wait*.

The Defendants alleged that the matter in dispute exceeded £500; the Plaintiff asserted that it was under £500; one of the questions being, whether a second bill, which was for £500, was accepted in substitution of a former, which was for £300. The first bill was drawn by *Brooks* and dated *Bristol*, January 5th, 1869, and was accepted by Mrs. *Wait*, payable at No. 67, *Redcliffe Street, Bristol*. The second instrument was in the form of a promissory note, and was also dated *Bristol*, January 13th, 1869.

From the affidavit of Mrs. *Wait* in support of the summons, filed the 10th of November, 1869, it appeared that none of the Defendants had for upwards of six months resided within the *Gloucestershire* County Court district. Mr. and Mrs. *Wait* had been during that period living at *Bournemouth, Hants;* Mr. *Prowse* at *Plymouth;* and Mr. *Garrard* at *Chew Stoke, Somerset*. It was further stated that it would be necessary to interrogate the Plaintiff.

From an affidavit in support by the solicitor of the Defendants

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(other than *Brooks*), it appeared that *Brooks* absconded in January, 1869, and deponent had been unable to find where he was now.

From the Plaintiff's affidavit in opposition, it appeared that although *Brooks* was absent from *Bristol*, still his residence was at No. 9, *West Clifton Terrace, Bristol.*

Mr. *Locock Webb*, for the applicants:—

The *County Courts Act*, 1865 (28 & 29 Vict. c. 99), s. 1, clause 3, empowers County Courts to exercise all the power and authority of the Court of Chancery in all suits for enforcing "any charge" or lien where "the charge" or lien "shall not exceed in amount the sum of £500." Sect. 3 of the same Act enacts that "any one of the Vice-Chancellors, on the application at Chambers of any party to any suit or matter pending under this Act, shall have power then and there, or, if he shall think fit, after hearing a summons served upon the other party or parties, to transfer the same to the Court of Chancery, upon such terms (if any) as to security for costs or otherwise as he may think fit." Sect. 9 of the same Act enacts, that "if during the progress of any suit or matter it shall be made to appear to the Court that the subject matter exceeds the limit in point of amount to which the jurisdiction of the County Courts is hereby limited, it shall not affect the validity of any order or decree already made; but it shall be the duty of the Court to direct the said suit or matter to be transferred to the Court of Chancery, and thereupon the said suit or matter shall proceed in such one of the Vice-Chancellor's Courts as the Lord Chancellor may by general order direct." Sect. 10, clause 6, of the same Act enacts that "proceedings in any suit or other matter under this Act which are not otherwise provided for" (amongst which are suits for enforcing charges) "shall be taken or instituted in the County Court within the district of which the Defendants, or any or either of them, shall reside or carry on business."

Sect. 128 of the original *County Courts Act*, 1846 (9 & 10 Vict. c. 95), which provided that where the Plaintiff dwelt more than twenty miles from the Defendant, or where the cause of action did not arise within the jurisdiction of the Court within which the Defendant dwelt or carried on business, the action might be brought in a superior Court, is, by the 33rd section of the *County Courts Act*,

1867 (30 & 31 Vict. c. 142), repealed; and by sect. 1 of the same Act it is enacted, that "a plaint may be entered in the County Court within the district of which the Defendant, or one of the Defendants, shall dwell or carry on his business at the time of bringing the action or suit, or it may be entered, by leave of the Judge or Registrar, in the County Court within the district of which the Defendant, or one of the Defendants, dwelt or carried on business at any time within six calendar months next before the time of action or suit brought, or, with the like leave, in the County Court in the district of which the cause of action or suit wholly or in part arose."

The first of the County Court Rules and Orders in Equity is, that "all suits under the 3rd clause of the 1st section of the Act" (of 1865) "shall be commenced by filing a plaint in equity in the County Court to which jurisdiction in the matter is given by the 10th section of the Act" (of 1865).

Here all the substantial Defendants live out of the district of the County Court of *Gloucestershire*.

The VICE-CHANCELLOR called upon

Mr. *Edmund S. Ford*, for the Plaintiff:—

The Order directs that the plaint shall be filed in the County Court to which jurisdiction is given by the 10th section, that is to say, in the County Court within the district of which "either of the Defendants" shall reside. Here one of the Defendants, *Brooks*, has a residence at *Bristol*.

It is further provided by the Act of 1867, that a plaint may be entered, by leave of the Judge or Registrar, in the County Court in the district of which the cause of suit arose. Here the instruments are dated at *Bristol*, and hence the cause of suit arose within the district of the *Gloucestershire* Court. The Defendants have taken no step, such as making a statement or otherwise, which might have raised the objection as to jurisdiction before the County Court Judge.

SIR W. M. JAMES, V.C.:—

The meaning of the statutes is, that as far as possible a matter shall be disposed of within the jurisdiction in which it *bonâ fide*

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arose. The circumstance that the notes were dated at *Bristol* is not of itself conclusive that the cause of suit arose in the district of the County Court of *Gloucestershire.*

The real point here is, that these Defendants do not reside within the jurisdiction of this County Court. The object of the statute (of 1865) was to bring justice home to the door of every man—that is to say, to the doors of Defendants. Here it is sworn that the substantial Defendants live—two of them at *Bournemouth,* one at *Plymouth,* and another in another County Court district in *Somersetshire;* and the only Defendant within the *Gloucestershire* district is in the Plaintiff's interest.

If a Plaintiff, having only, as he may be called, this "pocket" Defendant of his own within this district, were to go on with a plaint filed in the County Court of the district, in which none of the other Defendants reside, I should not hesitate to say that all orders made in such a matter would be wholly void and of no effect.

The summons must be allowed.

Mr. *Webb* asked if the Court would order the Plaintiff to give some security as to costs?

The VICE-CHANCELLOR:—No; I simply make the order for a transfer. It is not a case in which the County Court jurisdiction ought to have been invoked. My order will be subject to any order the Court may hereafter think fit to make as to the costs.

Solicitors for the Applicants: Messrs. *Jones, Blaxland, & Co.*
Solicitors for the Plaintiff: Messrs. *Warry, Robins, & Burges.*

In re COBRE COPPER MINE COMPANY.

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1869
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KELK'S CASE.
COUNT PAHLEN'S CASE.

Company—Forfeiture of Shares.

The proprietors of a mine in 1835 agreed to form themselves into a company, upon the plan that the mining property should be divided into 12,000 shares, of which 5500 should be retained by themselves, and the remaining 6500 allotted to the public at £40 a share, the allotment moneys being retained by the proprietors. The deed of settlement provided that if default should be made in payment of the instalments of the £40, the shareholder should cease to be a proprietor, and the share should be forfeited. Powers were reserved to increase the capital by (amongst other means) augmenting the amount of the shares, and of altering the existing laws, rules, and regulations of the company. In 1836 another deed of settlement was executed, the effect of which was to make the shares transferable by simple delivery of the certificates.

In 1866, it was resolved, at a general meeting held under the deed of settlement, that the capital should be increased by augmenting the 12,000 shares from £40 to £50, to be paid by instalments, upon non-payment of which the share was to be forfeited; that within a certain period the shareholders were to bring in their certificates, with the name, residence, and description of the holders, to be registered; and in default that the shares should be forfeited for the benefit of the company. It was also resolved that the company should be registered as a limited company under the Act of 1862.

Copies of the resolutions were sent to all the shareholders whose addresses were known; but the holders of 2405 of the 12,000 shares did not send in their certificates to be registered.

The holders of the 9595 shares who sent in their certificates were, in December, 1866, registered as a limited company, which, in 1868, went into voluntary liquidation, afterwards continued under supervision:—

Held, that the shares of the members who did not send in their certificates had been effectually forfeited; and that they were not liable to be placed on the list of contributories.

THESE were applications by summons, on behalf of *John Kelk* and *Count Pahlen*, that their names might be struck off the list of contributories of the *Company of Proprietors of the Limited Royal Copper Mines of Cobre.*

In 1835 the ownership of and the right of working a copper mine in the township of *Cobre*, in the island of *Cuba*, were divisible

See 5 Ch. 615.

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into 110 shares, which were held by twelve proprietors. In July of that year the proprietors agreed to form themselves into a company upon the following plan:—The whole beneficial interest in the mine was to be divided into 12,000 shares, of which the proprietors were to retain 5500 for themselves in certain proportions, and were to allot the remaining 6500 to the public at £40 a share, the allotment moneys being retained by the proprietors. The certificates for shares of the two classes were to be kept distinct; the former being coloured yellow, the latter red.

By a deed of settlement, dated the 13th of July, 1835, and made between the twelve proprietors of the one part, and three trustees of the other part, after reciting to the above effect, and that by another deed of even date the twelve proprietors had covenanted to stand seised and possessed of the property and plant upon trust for the association, it was witnessed that, for the purpose of establishing an association to be called "*The Company of Proprietors of the Royal Copper Mines of Cobre*," the proprietors should be co-partners under the above name, with the objects (clause 2) of working the aforesaid copper mine at *Cobre*, or any other copper mines in *Cuba*. It was provided that the £40 payable on the red shares should be paid by instalments, and the deed provided (clause 9) that if default should be made in payment of any of the instalments for thirty days, the person so making default should immediately thereupon "cease to be a proprietor" in respect of such shares, and the same shares, and all payments which might have been made in respect thereof, and all profits which might have arisen thereof, should be immediately thereupon "absolutely forfeited" to or for the benefit of the parties thereto of the first part, or their respective executors, administrators, or assigns, rateably according to their interest in the property of the association at the date of the deed.

Clause 28 empowered the court of directors, "with the consent of a special general meeting called for that purpose," from time to time "to increase the capital of the association for the purposes of purchasing any other copper mines or mining grounds, or for the general purposes of the association . . . either by issuing additional shares or augmenting the amounts of the existing shares, at such

price or prices, or by such sum or sums, and subject to such terms, stipulations, conditions, and regulations, as the said Court shall think fit;" and provided that the proprietors for the time being should have the option of taking such additional shares, rateably and in the proportions in which, as between themselves and the other proprietors, they should then be proprietors.

Clause 75 was as follows:—"That at any time after the 10th day of October, 1836, it shall be lawful for a special general meeting called for the purpose, from time to time, to amend, alter, or repeal, either wholly or in part, all or any of the clauses or provisions of this deed, or of the existing laws, rules, and regulations for the time being of the association, and to make any new or other laws, rules, and regulations or provisions in lieu thereof or in addition thereto, and such new laws, rules, and regulations or provisions, and such amendment, alteration, or repeal, if confirmed by a subsequent special general meeting called for the purpose, at a distance of not less than two weeks, or greater than four weeks, from such preceding general meeting, shall, but not till then, be binding and conclusive upon the proprietors."

Clause 77 provided that "a majority of two-thirds" of the number of votes at any special general meeting should be requisite to decide any question relating to "the making of any new laws, regulations, and provisions for the association."

Clause 80 was as follows:—

"That at any time after the 10th day of July, 1836, and before a second dividend shall be paid, the court of directors shall, by advertisements in two or more London newspapers, give notice to and require the holders of the certificates originally issued by the court of directors to attend with the same at the office of the association within such limited period as the court of directors shall for that purpose appoint, to the intent that the name and residence of every person then holding such certificates, and the number of shares comprised therein may be duly entered in a book to be kept for that purpose, and to be called 'The Share Register Book,' and to the intent that every holder of such certificates do, and shall then and there, execute a deed of covenant, in such form as the directors shall think proper, that he, his executors or administrators, while holding shares in the said association, will perform

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and observe all and singular the clauses, stipulations, and agreements contained in this present deed of settlement, and all rules, regulations, and bye-laws to be made in pursuance thereof, and to the intent that such original certificates shall and may then be cancelled, and that the court or directors of the association shall then cause to be delivered to every proprietor of any share or shares taken or required by him or her one or more certificate or certificates of such share or shares in such form as the court shall think fit, specifying the number or numbers thereof and the name and residence of each proprietor."

The 83rd clause provided that the certificate or certificates to be delivered by the directors to every proprietor of a share or shares should, as between the association and such proprietor, be conclusive evidence on behalf of such proprietor that he was a proprietor, and such certificate or certificates should continue to be such conclusive evidence until such share or shares should have become vested in some other person whose name and residence, as the new proprietor, should have been duly entered in the Share Register Book.

The 84th clause provided that the shares in the association should be assignable in such form, and subject to such covenants, as the directors should think fit, and that every transfer of shares should be registered in the register book of the association.

On the 24th of November, 1836, a second deed was executed between the then proprietors of the one part and the trustees of the other part. After reciting that it was considered that it would be more beneficial to the proprietors if the certificates were not called in pursuant to the 80th clause of the deed of settlement, and that at a general meeting of proprietors it had been resolved to the same effect, clauses 80, 83, 84, and several others were thereby repealed; and it was declared (clause 4) that all "holders or bearers" of share certificates, whether already issued or thereafter to be issued, should be deemed to be proprietors; also (clause 8) that the certificates delivered by the directors to the proprietors of shares should, "as between the association and the holders or bearers of such certificates, be conclusive evidence on behalf of such holders or bearers that they respectively" were proprietors in respect of the shares; and the receipts of holders or

bearers of certificates were (clause 10) made good discharges. By the same deed the parties of the first part covenanted with the trustees to observe and keep all the covenants and agreements of the deed of 1835, which had not been repealed.

In the year 1866, the company, after a career of great prosperity, had declined, and were indebted to their bankers in a considerable sum; and advertisements were published in several newspapers, summoning a general special meeting of the proprietors on the 31st of July, 1866.

At this meeting, resolutions to the following effect were passed:—

By the first, it was declared expedient that the nominal amount of the company's capital should be increased from £480,000 to £600,000, by augmenting each of the 12,000 shares from £40 to £50.

The second resolution declared it was expedient that the £10 should be paid by instalments of 10*s.* a share, the first on or before the 15th of October, 1866; the third declared that in the opinion of the meeting every holder of a share was liable to pay the £10 in such instalments; and by the fourth the directors were authorized and requested to increase the capital in accordance with the preceding resolutions.

Resolution 5 was as follows:—

"That the following shall be one of the laws, rules, and regulations of the company, that is to say; that if any instalment of the additional £10 payable on any share be not paid on or before the day appointed for payment thereof, then, at any time after default made, the court of directors (if they think fit) may declare every share in respect of which default is so made absolutely forfeited for the benefit of the company; provided that in special cases the court, if they so think fit, may remit the forfeiture as a matter of favour and not of right, but only on payment of every instalment then due and payable on the share, with interest at the rate of £10 per cent. per annum thereon while in arrear."

By the 6th resolution, clauses 4, 8, 10, and others of the deed of 1836, were repealed; and by the 7th resolution, it was declared that the following should be one of the rules and regulations of the

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company, and should be substituted for the 80th clause of the deed of 1835:—

"That at such time as the court of directors think fit, they shall, by advertisements . . . give notice to and require the holders of the now existing certificates . . . to deliver the same, with their names, residences, and descriptions written thereon, at the office of the company within such limited period as the court for that purpose appoint, to the intent that the name, residence, and description of every person then holding any of those certificates, and the number of shares comprised therein, may be duly entered in a book to be kept for that purpose, to be called the Share Register Book; and to the intent and so that every person so registered—his executors, administrators, and assigns, while holding any share or shares in the company—shall be bound to perform and observe in respect thereof all and singular the clauses, stipulations, and agreements contained in the company's deed of settlement, and from time to time in force, and all other the laws, rules, and regulations of the company from time to time in force, and to the intent that those now existing certificates shall and may then be cancelled, and the court shall thereupon deliver to every person so registered as the proprietor of every share or shares, one or more certificate or certificates of his share or shares, in such form as the court think fit, specifying the number or numbers thereof, and the name, residence, and description of the proprietor."

By resolution 8, it was declared that it should be a rule of the company that no holder of a then existing certificate should, after the directors' notice, be entitled to any dividend or share of profits, or to exercise any privilege as, or be considered as, proprietor, until he had delivered his certificates for cancellation.

The 9th resolution was as follows:—

"That the following shall be one of the rules and regulations of the company, that is to say: That if any person or persons holding any of the now existing certificates shall not, within the period limited by the notice calling in the now existing certificates, deliver the same with his name, residence, and description written thereon, at the office of the company for cancellation, the court of directors, at any time after the expiration of that period, may declare the

share or shares in respect of which default is so made absolutely forfeited for the benefit of the company; provided that in special cases the court of directors may, if they so think fit, and on such terms as they think fit, remit the forfeiture; but only as a matter of favour and not of right."

By the 10th resolution the 83rd, 84th, and other clauses of the deed of 1835 were re-enacted and revived, but so that the same should be read and have effect not with reference to the 80th clause of the deed of 1835, but with reference to the laws, rules, and regulations substituted for the same.

The 12th resolution was as follows:—

"That in the opinion of this meeting it is expedient that the company be registered under the *Companies Act*, 1862, as a company limited by shares, with a nominal capital of £600,000 in 12,000 shares of £50 each; and this meeting hereby authorize and request the court of directors to procure the company to be registered accordingly, and to take all such proceedings as are proper for the purpose."

Copies of the above resolutions were sent to all the shareholders whose names and addresses were known.

Such of the resolutions as did not need confirmation were immediately acted on; and at a meeting of directors on the 2nd of August, 1866, the court resolved that the nominal amount of the capital should be increased from £480,000 to £600,000 by augmenting each of the 12,000 shares from £40 to £50, the £10 being payable by instalments, of which the first 10s. was to be payable on the 15th of October, 1866. They also resolved that every person who, at that date, as the holder of a certificate, was the proprietor of a share or shares, should "be liable," and was thereby "bound to pay," the additional £10 a share.

At another special general meeting, held on the 21st of August, the rest of the resolutions passed on the 31st of July were confirmed.

On the 4th of October a circular was sent to each proprietor, enclosing a copy of the directors' resolutions, and stating that upon production of the bankers' receipt for the call-moneys, and the certificates of the shares, a memorandum of the payment of the call would be stamped on the certificate.

On the 31st of October notice was given by advertisement re-

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quiring the certificate-holders to deliver in their certificates with their names, residences, and occupations on or before the 3rd of December then next under penalty of forfeiture; and on the same date a circular explaining its objects, and signed by Mr. *Walter Shairp*, the managing director, was sent to the proprietors.

This circular stated that a very general wish had been expressed by the shareholders that the company should be registered as a company with limited liability; and explained that, if an unlimited company wished to become registered as limited, a list of the names, addresses, and occupations of the members "on a given day named in such list," must be delivered to the Registrar of Joint Stock Companies, and that a company constituted as theirs, the shares of which were transferable by simple delivery of the certificates, could not comply with the requirement, because it never could be known with absolute certainty who the members might have been on any given day. Hence arose the necessity of adopting some plan by which the names of the shareholders might be known; and this object could only be attained by calling upon the holders of the certificates to send in their certificates by a day fixed, "in order that the names of the holders may be placed on the register of members." The circular proceeded: "Inasmuch, however, as it would be unreasonable to anticipate that the certificates of every one of the 12,000 shares in the company will be sent in to the office by the time appointed, it becomes necessary to go a step further, and to make provision for the absolute forfeiture of all shares, the certificates of which are not sent in to the office by the day named." The circular then urged upon the proprietor addressed the necessity of sending in his certificates by the 3rd of December, and concluded thus:—"It is right to add that power is reserved to the directors to relieve from the forfeiture in special cases; but this power can only be exercised after the registration of the company."

On the 1st of December a second circular, signed by Mr. *W. Brooks*, was sent round to every proprietor who had not sent in his certificate, reminding him of the fact, and that the time for registering the certificates would expire on the 3rd instant.

The holders of 9595 of the 12,000 shares sent in their certificates on or before the 3rd of December.

Mr. *Kelk* and Count *Pahlen* were amongst those who did not send in their certificates. They had received dividends up to February, 1865, at which time Mr. *Kelk* held 202 (red) shares, and Count *Pahlen* 60; and they attended none of the subsequent meetings. Neither of them were original proprietors or amongst the parties to the deed of 1836.

By a resolution of directors passed on the 6th of December, 1866, all the shares, other than the 9595, were declared "absolutely forfeited for the benefit of the company."

The holders of the 9595 shares were returned by the directors as the existing shareholders of the company, for the number of shares held by each, and on the 13th of December, 1866, the company was registered as a company with limited liability.

Several calls, amounting, with the 10*s.* instalment above mentioned, to £5 10*s.* a share, had been since made, and the excess of liabilities over assets which, according to Mr. *Shairp's* affidavit, amounted on the 31st of December, 1866, to £57,363 10*s.* 6*d.*, had been by these and other sources (not being profit on the mines), reduced to £107 9*s.* 2*d.*

No call-notices were addressed to any of the shareholders whose shares had been declared forfeited; and neither Mr. *Kelk* nor Count *Pahlen* had paid any of the calls.

Subsequently resolutions were passed for winding up the company voluntarily, and on the 23rd of December, 1868, an order was made for continuing the liquidation under supervision.

On the 30th of April, 1869, the liquidators gave notice to Mr. *Kelk* and Count *Pahlen* that they intended to put their names on the list of contributories for 202 and 60 shares respectively; and that the settlement of such list would be proceeded with on the 11th of May following.

These summonses were taken out on the 28th of August and the 13th of November respectively.

Mr. *Lindley*, for Mr. *Kelk*:—

Mr. *Kelk* ought not to be on the list of contributories. He never was a member of the limited company at all. His name was never on the list of members of the new company. It is true he was a member of the old company; but before the new company was

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formed, his shares in the old company were forfeited by the directors. Hence he ceased to be a member of the old company, and never became a member of the new.

If the power of forfeiting shares was a valid power, notice to Mr. *Kelk* of the act of forfeiture was not necessary: *Knight's Case* (1).

The power of forfeiture was, under the circumstances, a valid power; the object of the resolutions being not merely the formation of the limited company, but also the raising of fresh capital by means of the augmentation of shares.

Even if it should be said that the forfeiture was *ultrà vires*, yet there has been since 1866 perfect acquiescence by all parties, and the liquidators are too late.

Mr. *Fischer*, for Count *Pahlen*.

Mr. *Kay*, Q.C., and Mr. *Bagshawe*, for the liquidators:—

These shares were transferable by simple delivery of the certificates. The directors had no means of knowing from time to time who were the members of the company. Yet they attempted to forfeit the shares of those who did not send in their certificates. Such an attempt to forfeit the shares of proprietors whose names are unknown behind their backs must be *ultrà vires* and void.

Forfeiture is always an act *strictissimi juris*: *Clarke* v. *Hart* (2). A general meeting of the company alone cannot sanction a forfeiture of shares: *Barton's Case* (3). Nor is a forfeiture valid which is attempted to be carried out for some collateral purpose: *Gower's Case* (4). And if a forfeiture be *ultrà vires* no lapse of time will render it valid: *Spackman* v. *Evans* (5); *Dixon's Case* (6).

In *De Pass's Case* (7), if *De Pass* had kept manual possession of the share certificates, he would have been liable.

In this instance, the act of forfeiture was a breach of duty. The company were throughout one and the same; there was no change of identity; and the language of the 183rd section of the *Companies Act* shews that registration under Part VII. of the Act does not, of itself, dissolve the continuity of a company.

(1) Law Rep. 2 Ch. 321.
(2) 6 H. L. C. 633.
(3) 4 Drew. 535; S. C. on appeal, 4 De G. & J. 46.
(4) Law Rep. 6 Eq. 77.
(5) Ibid. 3 H. L. 171.
(6) Ibid. 5 Ch. 79.
(7) 4 De G. & J. 544.

The effect of the resolution was directory only. It would be absurd to suppose that the mere omission of the name of a shareholder would destroy his rights, or relieve him from his liabilities. All that the "forfeiture" resolution meant was, that unless and until a man sent in his certificate he was not to be paid anything; it did not mean, that if he failed to send in by the 3rd of December, he was *ipso facto* to cease to be a proprietor; for there was a stipulation that he might be let in afterwards at any time. Suppose a "forfeited" shareholder had filed a bill to be re-admitted, what defence would the company have had?

No doubt the company had power to make new laws, rules, and regulations. But what sort of regulations? Merely by-laws—only machinery; they could not alter the constitution of the company itself.

Lapse of time can have no effect; and if it could, the acquiescence here has been of too short a period to produce any effect.

Mr. *Lindley*, in reply:—

The points are: 1. That notice to the shareholders was wholly unnecessary and immaterial; and, 2. That this is a case in which the Court will give effect to powers of forfeiture.

The resolutions of the 31st of July and the 21st of August were either valid or invalid. If they were valid, it is quite plain that the shares were forfeited, and that Mr. *Kelk* could not have asserted any right against the company; nothing irregular or improper has been committed, and notice to Mr. *Kelk* of the actual forfeiture cannot affect the question.

[The VICE-CHANCELLOR stopped the argument on this point.]

The only question, then, is, was this resolution *ultrà vires?* This was an unlimited company; any creditor could sue any shareholder; they had (clause 2) certain general purposes; they could forfeit (clause 9) any unpaid-up shares, on which instalments were in arrear; they could (clauses 75, 77) alter their regulations; in short, they could do anything which fell within the legitimate objects of their business; and, consistently with this, they could extend their power of forfeiture for nonpayment of instalments to the £50 shares.

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Then, in 1866, they wanted to raise additional capital, and they found that every shareholder was exposed to actions. There was a palpable blunder in the deeds of 1835 and 1836 with regard to the raising of additional capital; they had made their share certificates payable to bearer; and, by altering the deed of 1835, they had made the machinery less workable than before. By repealing the 80th clause they had destroyed their control over the holders of the certificates. Wanting, therefore, to raise money, and to turn the association into a limited company, they were driven to adopt this course, namely, to compel each proprietor to bring in his share certificates under penalty of forfeiture. By no other means could they have accomplished their object.

It is submitted that they did thus accomplish their object; and that the shares having become forfeited, these applications must be granted.

SIR W. M. JAMES, V.C.:—

It appears to me that, when the constitution of this company is considered, the matter resolves itself into a very simple case indeed.

This company was one of a very irregular constitution. It was a company consisting of persons who were not to be bound, unless they were called upon by some special matter afterwards, in any way whatever. They were to consist of the holders of certificates of shares, which were to entitle them to the benefits of the company. The capital originally was to be paid by yearly instalments. Every person was to pay a certain amount, and to pay it by certain instalments. No form of action is given, and no mode by which the company, or any person on behalf of the company, could sue the holders on those shares, for that was not considered necessary or desirable. The mode provided for it was this; they said: "You are to pay a certain sum of money down; that will give you a share in the company. You are to pay a certain sum on a certain date afterwards, and so you are to pay up the whole of your £40 share by certain instalments." Then what was to happen? If a holder did not pay the instalments, he was to cease to be a member; that is to say, the board of directors were to take care always to have money in hand by means of those in-

stalments for the purpose of paying the debts. It seems to me to be impossible to suppose, from the constitution of the company, that it was ever intended that there was to be anything like a call, or a mode of enforcing a call, because the shares were to be out in the world. The shareholders might be anywhere or nowhere, and if a holder of certificates of shares was minded to burn them, so that he ceased to be the holder or bearer of the shares, I do not know what liability would have attached to him according to the constitution of the company. Of course, as partner, he might be liable to the creditors, and there might be a liability independently of the constitution of the company; but I am speaking now of the liability of shareholders according to the constitution of the company. It is quite clear, with regard to the original capital, that the only mode by which the £40 was secured to be paid was by these calls, and if default was made in the payment of any of the instalments, the shares were thereupon to be absolutely forfeited to and for the benefit of the others.

Then there comes the 28th clause for raising further capital; and to my mind it is quite clear that that clause, as originally drawn, simply contemplated the raising of additional capital by means of fresh shares. But, however, they put in here, "or by augmenting the amounts of the existing shares by such sum or sums as the proprietors should think fit." They were to augment the shares. Again there is no provision for any liability, and really it is very difficult to say what action could ever be brought by any body on behalf of the company against a person who was a shareholder, and had merely got the certificates in his hands. We must suppose that the framers of this deed knew very well what the state of the law was with regard to bringing actions. I apprehend that they knew they had no right to enforce payment of the augmented capital by action, but that the augmented capital was to be payable, and the payment of it was to be enforced in exactly the same way as the original capital. I cannot read it otherwise. I read the 9th and 28th clauses together, as saying that if the original capital was not paid by certain instalments, then the proprietor was to cease to be a shareholder. It seems to me that there was nothing more intended to be done with regard to the additional capital. The additional capital was to be secured in that

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way. It was a kind of cost-book company. That is to say, "If you do not choose to pay the additional capital, there being a condition annexed to your shares that you shall pay the additional amount required from the shareholder, you cease to be a member." That seems to me to be the general scope of the deed. Therefore one would suppose that the managing body would take care that they had money in hand for the management and for the purposes of this concern, and it would be said: "If you do not choose to pay this sum, you will cease to be a member." They did afterwards, by general meeting, increase the capital of the company by augmenting the amount of the existing shares by £10. Then what was the result of that? The £40 shares ceased to be shares; and nobody was entitled to anything excepting a certificate of the share. The company duly exercised its power; instead of £40 shares, they were made into £50 shares, and nobody could claim anything unless he could shew himself to be the holder of a certificate of a £50 share. Whereupon, in accordance, as it appears to me, with the whole scope of the original deed, when the resolution was passed for the purpose of raising the share from £40 to £50, this further resolution was passed. Part of the scheme was, that this further resolution should be passed, and I apprehend that the whole company and every shareholder in the company must be considered to have had notice of the scheme which was then adopted. It was this: The shares now are to be considered to be £50 shares, and every person who is the holder of a £40 share shall be entitled to have a £50 share, upon his paying up £10, and bringing in his old certificates for exchange for new certificates for £50 shares. This was known to all the shareholders; they must be taken to have had notice of it. The meeting was duly convened, and the resolutions duly passed; that is admitted by the parties. Then, that being so, if any body does not do this, they say his shares shall be forfeited. Every one of the shareholders who chose to pay and go on, did it under the resolution, and knowing that that was a part of the constitution of the company from that time. A great number of shareholders were minded to continue the company upon that footing, and to continue to be members of the company, paying their £10 more; and upon the footing that the persons who did not do so were to lose

all interest in the company. They were minded to continue, and did continue, the company; they had themselves registered as a limited company upon the footing of those resolutions, and the persons who were not minded to continue, it seems to me, simply withdrew from the company. That was in accordance with the constitution of the company.

I am of opinion that it is utterly impossible for the shareholders who joined in that resolution, and who accepted the terms of the resolutions passed at that general meeting, to say: "Oh, the whole of these proceedings were illegal; we had no right whatever to do it, or to say that you had ceased to be a member, and we now set up the invalidity of our own scheme of reorganization against the persons who submitted to it."

It seems to me that this case is not bound in any way by *Spackman* v. *Evans* (1). That was a case of an attempt by the parties to do something which both parties knew to be illegal.

Here the company have passed resolutions; it appears to me that those resolutions were not illegal, that they were merely in furtherance of the scheme and constitution of the company; that these gentlemen allowed themselves to be dropped out of the company, and that the company allowed them to be dropped out; and, that being so, they cannot now be put upon the list of contributories.

Therefore both applications will be granted; and both applicants will have their costs.

Solicitors for Mr. *Kelk:* Messrs. *Fladgate, Clarke, & Finch.*
Solicitors for Count *Pahlen:* Messrs. *Farrer, Ouvry, & Co.*
Solicitors for the Liquidators: Messrs. *Uptons, Johnson, & Upton.*

(1) Law Rep. 3 H. L. 171.

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In re EUROPEAN LIFE ASSURANCE SOCIETY.

Winding-up—Companies Act, 1862—*Life Assurance Company—Tests of Solvency.*

Inability of a company to pay its debts under sect. 80 of the *Companies Act*, 1862, is an inability to pay debts actually due, for which a creditor could claim immediate payment.

The Court will not order a company to be wound up under the just and equitable clause by reason of any liabilities not immediately payable unless it is reasonably certain that the existing and probable assets will be insufficient to meet the existing liabilities, and will not in any case take into account the possible liabilities or profits which may accrue in respect of future business.

THESE were two Petitions for winding up the *European Life Assurance Society*. The society was established as the *People's Provident Assurance Society* in 1854, and in 1859, upon an amalgamation with the *European Life Insurance and Annuity Company*, its name was changed by Act of Parliament (22 Vict. c. 25) to the *European Assurance Society*. No less than thirty-three different companies had become amalgamated with, and were now represented by, the society. The original capital was £200,000, divided into 80,000 shares of £2 10*s*. each. In 1862 the capital was increased to £1,000,000, consisting of 400,000 £2 10*s*. shares. Up to May, 1868, 308,863 shares had been subscribed for, of which 2294 were fully paid up, and 10*s* per share had been called up on the remainder. In July, 1869, a call of 5*s*. per share was made for the purpose of discharging a debt of £15,000 to Messrs. *Hopkinson*, bankers of the society; but this call, though paid by most, had not been paid by all the shareholders, and had produced £50,000 only instead of £75,000. The society had issued a large number of life and fidelity policies, and granted annuities to a considerable amount, the income in respect of these particulars being large. The claims against the society were also, as it was stated, large, and there were at the time of presenting the Petition claims on policies amounting to £100,000, many of which would be immediately payable.

The Petitioner *Crawford* was a director, and the holder of 400 shares in the society, and held a policy for £300 upon his own life. He was also interested in two other policies on the lives of debtors of his, and had been agent of the society in *Edinburgh*.

The Petitioner *Coupe* was the holder of 3000 shares in the society. *Crawford* stated that as a director he had from time to time objected to divers acts and proceedings recommended by the manager and actuaries of the society, and in particular to the appropriation in 1867 of £70,000 by way of bonus to the share and policy holders. He had also endeavoured to effect a reduction in the fees paid to the directors, commission to agents, and in the expenses generally, and in 1868 and 1869 to the payment of any dividend to the shareholders. A committee of investigation was appointed on his motion in December, 1868, but had found the greatest difficulty in obtaining from the officers of the company the information required, and the recommendations of the committee had been disregarded. After stating that the Petitioner felt bound in the interests of all concerned in the affairs of the society to present this Petition, and that, though hoping that some provision might yet be made for the maintenance of the business of the company, was satisfied that the interposition of the Court at the present time was essential, the Petition alleged as follows:—"The moneys available at the head office in *London* for the payment of the current claims against the company do not exceed £10,000, and these moneys are made up of what remains of the sums received on the call, and of the premiums received from day to day. There are also sums due from the several agents of the company at home and abroad, but these sums, together with those available at the head office, are utterly insufficient to meet the amounts becoming due on policies which have already matured into claims, and the liabilities are necessarily increasing daily. The company is, in fact, altogether insolvent, and unable to pay its debts. Its assets over and above the moneys already mentioned, and what is unpaid on the shares, are comparatively trifling."

The Petition of *Coupe* (who was stated in the affidavits in opposition to his Petition to be in arrear in respect of, and without means of paying, the call of July last) contained similar allegations as to the society, the pecuniary condition of which was unsatisfactory and unsound, being unable to pay its debts, or continue its business with any prospect of success; the great drain on its resources from numerous deaths among the assured, and the heavy charges for expenses of management, and the absence of any suffi-

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cient reserve fund; that the society had been compelled to use up all its available funds and securities, and make a call of 5*s.* per share, for the mere purpose of providing ready money to meet current and pressing liabilities, and, in reality, to stave off the period when stoppage should become imperative; that the real cause of the recent discontinuance of the business carried on by the society in the *United States* was the withdrawal of the government license, such withdrawal being based upon the unsatisfactory and unsound pecuniary condition of the society; and, lastly, that any postponement of the winding up of its affairs must involve a waste of its assets.

The total sums insured upon current policies amounted to about £8,750,000; the premium income receivable being about £290,000 per annum. The average age of the lives assured was stated as forty-two years, and the average duration of the policies as nine years. The liability under annuities was £140,000, and the claims accrued on life policies were £120,000.

The balance sheet of the society of the 31st of December, 1868, was as follows:

General Balance Sheet of the European Assurance Society, December 31, 1868.

Dr.

	£	*s.*	*d.*	£	*s.*	*d.*
Subscribed Capital .. .. (Capital paid-up £183,798 16*s.* 6*d.*)	..			779,349	11	0
Sundry Accounts:						
Deposits	2,818	18	3			
British Nation (Share Account)	765	7	0			
Royal Naval and Military ditto	2,751	5	9			
Agents' Bonus	2,325	0	0			
Hopkinson & Co.	5,000	0	0			
British Reversionary Company	816	0	8			
Etna Company	3,624	8	11			
Sundry Accounts	147	4	5			
				18,248	5	0
Liability under Assurances, or Balance of present Value of Sums Assured over present Value of Annual Premiums and present Value of Annuities of £17,943 3*s.* 7*d.*	..			312,486	0	0
Life Claims admitted and not admitted, viz.:—						
Admitted	60,506	3	5			
Not admitted	39,232	3	2			
				99,738	6	7
Guarantee Claims admitted	1,299	4	6			
Ditto under investigation, £20,414 17*s.* 1*d.* (It is estimated that the payments on this Account will not exceed	10,000	0	0			
				11,299	4	6
Balance in favour of Company	..			107,205	18	2
			£	1,328,327	5	3

General Balance Sheet of the European Assurance Society, December 31, 1868.

Cr.

	£ s. d.	£ s. d.
Consols	32,000 0 0	
Indian Government Debentures	10,550 0 0	
		42,550 0 0
United States Stock	29,938 13 0	
Buffalo City Bonds	11,663 16 8	
		41,602 9 8
Melbourne Property		6,650 2 7
Value of Annuities receivable by the Government as per last Valuation	9,083 6 0	
Instalments of Annuities due	792 19 5	
Reversions as per last Valuation	7,958 3 9	
Railway Debentures	6,000 0 0	
Alexandra Hotel Debentures	4,100 0 0	
Loans and Mortgages, including Interest due	57,207 11 1	
Amount due from *International Insurance Company*	1,000 0 0	
Amount due from *Mercantile Union*	920 10 10	
Purchase of Business Account	261,817 15 10	
		348,880 6 11
Loans on Policies	68,337 4 5	
Half Credit Premiums	38,359 5 4	
		106,696 9 9
Leases of Premises	9,037 7 0	
Furniture, Fixtures, and Fittings	4,045 17 2	
		13,083 4 2
Agents' Balances	71,559 16 6	
Premiums in course of payment at Chief Office	5,847 10 4	
Sundry Accounts—Fire Department.		
Cash in hand and at Bankers	188 10 7	
Consols	883 15 0	
Loan	65 0 0	
Agents' Balances	4,611 5 4	
	5,748 10 11	
		83,155 17 9
Deposits.		
Melbourne	25,000 0 0	
Sydney	9,445 15 7	
India	1,007 8 0	
New York	6 0 11	
London	1,500 0 0	
	36,959 4 6	
Current Accounts.		
At *London* Bankers	11,090 10 0	
Melbourne Bankers	913 19 7	
Sydney Bankers	104 2 8	
India Bankers	1,036 0 5	
	13,144 12 8	
		50,103 17 2
Cash in hand		54 2 9
Estimated Value of Re-assurances with other Offices—at least		40,000 0 0
Capital at Call		595,550 14 6
		£1,328,327 5 3

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The effect of the evidence and the arguments fully appears in the judgment.

Mr. Serjt. *Sargood*, and Mr. *Higgins*, appeared in support of *Coupe's* Petition.

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, in support of *Crawford's* Petition.

Mr. *Glasse*, Q.C., and Mr. *Millar*, for the society, and

Mr. *Fry*, Q.C., and Mr. *Bevir*, for fourteen shareholders, representing £8370, and for 3657 policy-holders, representing £1,456,000 in assurances, opposed the Petition.

Mr. *Amphlett*, Q.C., Mr. *Karslake*, Q.C., and Mr. *Whitehorne*, also appeared.

The following cases were cited: *Ex parte Spackman* (1); *In re Anglo-Greek Steam Company* (2); *In re National Live Stock Insurance Company* (3); *In re Suburban Hotel Company* (4); *In re Joint Stock Coal Company* (5).

Sir W. M. James, V.C.:—

Since this case was first brought before me I have applied my mind to it, and the same reason which induced me to hear it as soon as possible in the vacation—namely, the enormous magnitude of the interests involved, and the great embarrassment which the hanging over of a matter of this kind must occasion both to the company and to the persons having dealings with it, induces me now not to defer the delivery of the decision which I am about to pronounce. This case is a novel one in some respects. A Petition has been presented by a shareholder — though there are two Petitions they are in substance the same—asking the Court to wind up the company under one of the clauses in the Act of Parliament by which a company may be wound up—for it is not imperative on the Court to issue a winding-up order—whenever a company is unable to pay its debts, or whenever the Court is of

(1) 1 Mac. & G. 170.
(2) Law Rep. 2 Eq. 1.
(3) 26 Beav. 153.
(4) Law Rep. 2 Ch. 737.
(5) Law Rep. 8 Eq. 146.

(2) S.C. 35 Beav. 399. 11 Jur. N.S. 323.

opinion that it is just and equitable that it should be wound up. With regard to the payment of debts, there are certain things given as *indicia* of inability to pay debts, followed by the general clause empowering the Court to make the order whenever it is proved to its satisfaction that the company is unable to pay its debts. Now, it is not suggested that the company has been unable to pay its debts in the sense that it has failed to pay every demand which has been made upon it. It is not suggested that it has not found the money to meet everything that has become payable in due course; it is not suggested that it has vexatiously or dishonestly disputed claims for the purpose of not discharging them; and it is not suggested, therefore—at all events, there is no evidence before me—that in the sense of debts actually due within the meaning of the 1st clause of the 80th section of the Act any debt due and payable has not been paid. But it is contended that the company is unable to pay its debts in the sense that it has been obliged to pay them out of assets not properly applicable to them, and that it has only been able to pay its debts in, as it were, a hand-to-mouth way by applying current income to discharge past liabilities—a proceeding which I agree, as has been said in the course of the arguments, would not be justifiable on the part of such a company. The contract with the policy-holder is, that the assets of the company, at the time when the claim matures, shall be the fund out of which the claim shall be satisfied; and no doubt the taking of all the premiums accruing due after that in payment of past liabilities would be an improper application of the assets. Of course all that must be considered in a practical business-like way. It cannot be pretended that a call ought to be made if there is money in the hands of the society, debts due, or assets existing at the time of the maturity of the claim, applicable to the satisfaction of that claim. I think that the Petitioners have not made out a case at all in any sense of inability to pay debts within the meaning of the Act of Parliament. I apprehend that Mr. *Glasse* is right in his construction, that inability to pay debts must refer to debts absolutely due—that is to say, debts for which a creditor may go at once to the company's office and demand payment The case has therefore been put, really and substantially, not upon the ground of actual inability to pay a debt actually due, but

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upon another ground—a very important one in regard to these companies—viz., upon the ground of the application of the 5th sub-section of the 79th section to cases which are *ejusdem generis*, or to be governed by some reference to other cases specially provided for—that is, "whenever the Court is of opinion that it is just and equitable that the company should be wound up." I agree that this is a jurisdiction which this Court has no more right to refuse to exercise than any other jurisdiction which is given to it by Act of Parliament. The Court is bound to exercise that jurisdiction of winding up if it is of opinion upon hearing the whole case that it is just and equitable—not that it is prudent, but that it is just and equitable—that the company should be wound up. And in my view of the law of the case it would be just and equitable to wind up a company like this assurance company if it were made out to my satisfaction that it is, not in any technical sense but, plainly and commercially insolvent—that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain—as to make the Court feel satisfied—that the existing and probable assets would be insufficient to meet the existing liabilities. I take it that the Court has nothing whatever to do with any question of future liabilities, that it has nothing whatever to do with the question of the probability whether any business which the company may carry on to-morrow or hereafter will be profitable or unprofitable. That is a matter for those who may choose to be the customers of the company and for the shareholders to consider. I have to look at the case simply with reference to the solvency or insolvency of the company, and in doing that I have to deal with the company exactly as it stood on the day to which the evidence relates—viz., the 31st of December, 1868, which I assume to represent substantially the state in which the company stands now. I must take it as if all the business which the company ever intended to do was then done, as if its business were confined to its existing contracts, and as if it did not mean to enter into one single fresh contract or do anything more. Then, having regard to the state of the assets and the liabilities at that time, is it proved to my satisfaction that the company is unable or will be unable to meet the claims under its existing contracts? Now, it was pressed very much upon me that, in looking

at that, I was not to regard the subscribed but uncalled-up capital of the company. I am unable to take that view. It appears to me that that is about the first asset which one looks to in testing the solvency or insolvency of a company like this; and I cannot help thinking that this explains a great deal of the evidence given by the actuaries in support of the Petition. The evidence of the actuaries is this: They say, having regard to the length of time which the company has been in existence, and the income which it has received for years on policies averaging nine years in duration, it ought to have had invested a sum, in round numbers, of about a million sterling, at 4 per cent., in order to be in what they call a safe position. I think I am justified in saying that every one of these affidavits is based upon the assumption and theory that this should be treated as a mutual assurance society—that is to say, having nothing but the assurance funds to be resorted to, and that then, in order to put it in a state of what they deem adequate security for an office of that kind having lived so many years, it should at this time have such a fund as that; but they wholly disregard the share capital. One of them, indeed, says he does not regard that at all. Now, I think that that kind of evidence—which, assuming the company to be a mutual assurance society, and to have nothing whatever to look to but the accumulated premiums and the future premiums, states that it would require a sum of one million, and that this company has not a million or anything like it—is very far short of the evidence which it is incumbent on the Petitioners to produce to satisfy this Court that there is that insolvency which would make it just and equitable for it to interfere. Passing from the evidence of the actuaries, I have to consider that which pressed on my mind for a long time during these proceedings, viz., the society's balance sheet itself on the 31st of December, 1868, with the corrections which it appeared to me ought to have been made in it. That balance sheet as it stands represents the company as not only being solvent, but as having its whole capital intact, and as having £107,000 besides — that is to say, with £800,000 odd beyond the sum necessary to meet its liabilities. But on the side of the assets there is inserted a sum of £261,000 for the purchase of business account. That item ought never to have appeared there. I am

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sorry to find it there. I cannot conceive that that could have been properly represented as an asset. It may have been a very judicious investment, but it ought never to have been an investment out of the assurance fund. If the company thought of doing such a thing as that, what they ought to have done was to have called up from their shareholders capital, and no part of the assurance money should have been invested in buying the goodwill of a business, and having bought that goodwill it certainly ought not to have been put down as an asset available, in any sense of the word, for the purpose of meeting the liabilities set down on the other side of the account. I, therefore, deduct this £261,000 from the side of the assets. Then, on the other side, it did appear to me for a long time that it would be necessary to add to the amount of the liabilities, which are taken at £312,000, that further sum which Mr. *Walker* in his cross-examination stated would have to be added to them if the expenses were included, which seem to have reached in the past year to £70,000, a very large amount, which I am told is likely to be diminished. During a considerable part of the hearing I was much impressed with that view, but I do not think it is a sound one. It does seem at first sight a startling thing to say "I take the gross income, and I don't deduct anything for the expenses." But then there is force in what Mr. *Woolhouse* says in his affidavit, that these expenses are for the purpose of acquiring new business. I am testing now what are the assets to meet the existing liabilities of the company; and if the company were content to say, "We are willing to go on; we have got our existing contracts; only, rather than incur the expense for agents, for offices, and the like, we are content to receive the premiums that are due upon our existing policies, and to apply those premiums as they may be wanted, and provide for payment of the existing liabilities"—if they were minded to take that course, and not to be competitors with other offices for fresh insurances, I do not know why they need take £70,000 a year for expenses, or even incur any large proportion of that sum. I think, therefore, that Mr. *Woolhouse* has made the true answer—that nothing like that sum ought to be expended, and that some reduction must be made in respect to that. If I were to take upon myself to appoint a manager as receiver of the premiums due from the policy-holders, all the policy-

holders would have to pay their money, for that is in their contract, without putting the company to any further expense. Then I do not think there is that inaccuracy in the estimate of the liabilities which was first pressed upon me, and I cannot add to it that three-quarters of a million, or any great portion of it, in testing the question of solvency. It is also urged on the other side that we cannot take all the £595,000 of unpaid-up capital as available assets, and that the fact that a call for upwards of £70,000 produced only £50,000 is a proof that it is not all to be relied on; but I think, in the absence of any evidence of the insolvency of the shareholders, it would be far too wide and speculative for the Court to act upon the assumption that the shareholders are not able to pay that capital which they have undertaken to pay. Therefore it appears to me that, as far as the case now stands, taking the liabilities accruing upon the calculations in this balance sheet, and taking the assets as including the unpaid part of the share capital, it is not open to any shareholder, and it is not open to any policyholder (for upon that all their rights are the same) to say, "I ask the Court to put an end to all contracts now existing, because I have made out to the satisfaction of the Court that the company will be unable to discharge its liabilities under those contracts when they arise." Any suspicion that mismanagement may continue is a thing with which this Court has, of course, nothing to do. Profit or loss, prudence or imprudence, are matters with which this Court has nothing whatever to do. This Court gives no opinion whether persons ought or ought not to trust the company. It has simply to deal with those matters which are properly before it. The Petitioners have failed to prove that which it was requisite for them to prove—viz., that this company is insolvent, and that being so, the Petitions are dismissed with costs.

Solicitors: Messrs. *Freshfield;* Messrs. *Lewis, Munns, Nunn, & Longden;* Messrs. *G. L. P. Eyre & Co.*

V.-C. J.
1869
Nov. 13, 25; Dec. 21.

LINDSAY *v.* GLADSTONE.
BROOKE *v.* GLADSTONE.

Practice—Production of Documents—Inspection—Accountant—Solicitors' Clerk.

L., a partner in an Indian firm now dissolved, had, in a suit against his former partners, obtained an order for production of the books, with leave to inspect. *L.* became bankrupt, and *B.*, his assignee, revived the suit.

Upon application by *B.* to have the benefit of the order, it appearing that the books were very voluminous, and that the accounts were kept in Indian currency:—

Held, that *B.* was entitled to the benefit of the order to inspect; and to take in an accountant; and, it appearing that *L.* was conversant with accounts, and had himself kept some of the books, that *B.* was entitled to take in *L.* as such accountant.

An order having been made that *B.*, his solicitors or agents, be at liberty to inspect documents, with the assistance of *L.* as his accountant; *L.* and a clerk of *B.*'s solicitors' firm went to the place of inspection, and *L.* was refused to be allowed to inspect, except in the presence of *B.*, or one of the principals of his firm of solicitors:—

Held, that *L.*, if accompanied by a duly authorized clerk of *B.*'s solicitors' firm, was at liberty to inspect.

THIS was an application by summons on the part of *Alexander Brooke*, the Plaintiff in the second suit, that *David Baird Lindsay*, the Plaintiff in the first suit, "and his accountant," might be at liberty to inspect and take extracts from, or copies of, the several books and documents mentioned in an order made in the cause, dated the 21st of November, 1868.

The first suit was instituted in January, 1867, by *Lindsay*, claiming to be a creditor of the Defendants, *Robertson Gladstone*, *Archibald Kelso*, *James Wyllie*, and *William Grant*, in respect of the partnership dealings of *Gladstone, Wyllie, & Co.*, a firm carrying on business at *Calcutta* and *Rangoon*, and in *London*, in which the Plaintiff and Defendants were partners, and which was dissolved in 1859. From 1850 to 1855 *Lindsay* himself, who was the resident partner at *Calcutta*, kept the books at that place.

By an order in the first suit, dated the 17th of February, 1868, the Defendants were directed to make the usual affidavit as to documents; and by another order in the first suit, dated the 21st of November, 1868, it was ordered, upon *Lindsay's* application,

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that upon his prepaying the expense of conveyance, the Defendants should, within six weeks after the receipt of notice from *Lindsay* at their offices at *Calcutta* and *Rangoon* respectively, transmit to their *London* office such of the books set forth in their affidavit as were at the first-mentioned offices, and as should be specified in such notice; and that "the applicant, his solicitor or agent," was to be at liberty to inspect such books, and take copies or abstracts thereof.

On the 5th of February, 1869, *Lindsay* was adjudicated a bankrupt, and *Brooke* was on the 8th of March appointed creditors' assignee, and revived the first suit.

After that date the books arrived, and on the 21st of October Mr. *Colley*, one of the firm of *Brooke's* solicitors, attended at the Defendants' office in company with *Lindsay*, as *Brooke's* accountant, when one of the firm of Defendants' solicitors produced the books, but refused to allow any person except *Colley* or *Brooke* to inspect them.

This summons was then taken out; and a correspondence between the solicitors ensued, in the course of which Defendants' solicitors said they never objected to an accountant inspecting; they thought an accountant was the proper person to inspect; their objection was to *Lindsay* inspecting without either *Brooke* or an accountant being present. To an inspection by an accountant they were willing to agree, and if *Brooke's* solicitor thought it necessary or desirable that *Lindsay* should be present to assist him, Mr. *Wyllie* had instructed them to say he would raise no objection. To this *Brooke's* solicitors wrote to say they did not wish to be tied down to take an accountant and *Lindsay* each time they wished to inspect, but to be at liberty to take either or both as might be necessary. It might turn out that no accountant would be necessary. Defendants' solicitors thereupon refused to agree to *Lindsay* alone inspecting the books as accountant.

It was deposed that the books weighed upwards of a ton and a quarter; that they were kept entirely in Indian currency; and that it would be impossible for *Brooke* or his solicitor to "understand any of the accounts without competent assistance."

Lindsay deposed that he believed he could, better than any one else, and in less time, unravel the questions of account, and pro-

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perly inform *Brooke* thereon; and it would be a matter of great labour and expense for any one but deponent himself to do it.

Mr. *Woodroffe*, for the Plaintiff *Brooke*:—

The order of November, 1868, enabled the applicant, "his solicitors or agents," to inspect. It is submitted that *Brooke* is within the terms of that order.

But if not, he is entitled to the present order, standing as he does in the place of *Lindsay*.

An applicant entitled to inspect will be allowed to take in a professional accountant where the accounts are complicated: *Bonnardet* v. *Taylor* (1). Here it is shewn that if it should be found necessary to go into the accounts at all, an expert will be required; then why should not *Brooke* be allowed to take in *Lindsay*, who is qualified to act if required, and thus save the expense of a professional accountant?

Mr. *Bedwell*, for the Defendants:—

This is a special application, which must be "supported by special grounds:" *Boyd* v. *Petrie* (2). It is not sworn here that the accounts are complicated, and if the only difficulty be that they are kept in rupees, that is no difficulty at all: *Swansea Vale Railway Company* v. *Budd* (3).

Moreover, *Lindsay* is now nothing else than a witness. All his estate has passed to his creditors, amongst whom we ourselves claim to be. Inspection of the accounts ought not to be permitted to a person in his situation; at least, not without the presence of a professional accountant, who would be impartial and responsible.

SIR W. M. JAMES, V.C.:—

I see no reason why the applicant should not be allowed to take in *Lindsay*, as his accountant, if he thinks fit so to do, instead of employing a professional accountant, at a great expense. *Lindsay*, it seems, kept the books, and therefore must be conversant with accounts. It is no part of the Defendants' right or interest to select the adviser of the other side.

(1) 1 J. & H. 383. (2) Law Rep. 3 Ch. 818-9.
(3) Law Rep. 2 Eq. 274.

Here *Lindsay* has himself obtained an order for inspection. He has become bankrupt, but his assignee, it appears, has some faith in his claim, for, although liable for the costs of the suit, he is willing to take upon himself the risk of going on with it.

It is true that the word "complicated" is not used with reference to these accounts, but it is certain that they are very extensive, and they appear to have been kept in Indian currency, not only at *Calcutta*, but at *Rangoon* also. I consider, therefore, that this is a case in which the assignee, *Brooke*, is entitled to avail himself of the assistance of an accountant, and if he is willing to employ the services of *Lindsay* in that capacity, I see no objection to his being allowed to do so.

The costs of this application will be costs in the cause.

Nov. 25. The following are minutes of the order that was made of this date:—

That the applicant, *Alexander Brooke*, his solicitors or agents, be at liberty to have the same inspection of the several books and documents mentioned in the said order, dated the 21st of November, 1868, as was given to *David Baird Lindsay* by the same order:

And it is ordered that the applicant, his solicitors or agents, be at liberty at all seasonable times, upon giving reasonable notice, to inspect the same, with the assistance of *David Baird Lindsay* as his accountant.

Dec. 21. In these suits another application by summons was this day made, on behalf of *Brooke*, by special leave, that a clerk from the office of *Brooke's* solicitors, and *Lindsay*, as the accountant of *Brooke*, might be at liberty to inspect the documents.

It appeared that on the 9th of December *Lindsay* and a clerk of *Brooke's* solicitors went to the Defendants' office to inspect, and were refused to be allowed to do so, except in the presence of *Brooke*, or one of his solicitors.

Mr. *Woodroffe*, for the Plaintiff *Brooke*:—

It would be a great hardship to compel this assignee, who knows nothing of the books, and is not conversant with accounts, or to compel one of the principals in *Brooke's* solicitors' firm, to attend every occasion of examination, through a protracted inspection.

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Mr. *Amphlett*, Q.C., and Mr. *Bedwell*, for the Defendants:—

The Court will not allow *Brooke's* solicitors' firm to be represented by a mere office boy.

SIR W. M. JAMES, V.C.:—

I cannot suppose that they will do as you suggest. Let a clerk attend; and if they abuse the order by sending any one of the kind you describe, come to me, and I will deal with it.

The order was to the effect that *Lindsay* be allowed to inspect accompanied by a duly authorized clerk of *Brooke's* solicitors. The costs of the application to be costs in the cause.

Solicitors for the Plaintiffs: Messrs. *Allen, Colley, & Edwards.*
Solicitors for the Defendants: Messrs. *Oliverson & Co.*

In re GREGG. *In re* PRANCE.

M. R.
1869
Dec. 3, 10.

Solicitor and Client—Order for Taxation—Practice—Informal Service without Indorsement—Affidavit sworn before Agent of Solicitor who prepared it—Writ of Attachment—Irregularity—Motion to discharge—Costs.

Messrs. *G.*, solicitors, having been requested by *P.*, another solicitor, on behalf of a client for whom they had hitherto acted, to deliver up all deeds belonging to the client on the usual terms, sent the deeds to a relative of the client who held a power of attorney from him, with the bill of costs, the amount of which they retained out of moneys in their hands belonging to the client, and they then informed *P.* that they had no deeds in their possession, and no bill of costs against the client. An order of course was then taken out by *P.*, on behalf of the client, for taxation and delivery up of deeds and papers, but it was not complied with, and a writ of attachment was issued against Messrs. *G.* On a motion to set aside the attachment with costs to be paid by *P.* personally:—

Held, that, in the circumstances of the case, Messrs. *G.* were not justified in refusing to deliver up the papers, or to give in their bill for taxation:

Held, also, that it was no ground of objection to the attachment, that, in consequence of the indorsement required by Cons. Ord. XXIII. r. 10 being omitted in the order first served on Messrs. *G.*, it had been served a second time in proper form more than fourteen days afterwards; nor that the affidavit prepared by *P.* of non-compliance with the order, on which the attachment was issued, was sworn by the client before a solicitor to whom *P.* had sent it for the purpose of getting it sworn, and who was his agent for that purpose only; nor that a month had elapsed between the date of the affidavit and the issuing of the attachment:

Held, also, that no misconduct having been alleged or proved against *P.* in regard to the attachment, he could not on other grounds be made liable for the costs of such an application, and that the motion must be refused with costs.

THIS was a motion on behalf of Messrs. *W. R. & H. A. Gregg*, solicitors, that a writ of attachment issued on behalf of *R. H. Procter*, by *Vaughan Prance*, his solicitor, might be set aside or otherwise discharged with costs to be paid by *Prance* personally.

It appeared that *R. H. Procter* had executed a deed of gift of his property in favour of his nephew *Gilbert Procter*, to whom he had also given a general power of attorney to act for him.

Messrs. *Gregg* had been for some years the solicitors of *R. H. Procter*, but on the 19th of June, 1869, *Prance*, who had then become his professional adviser, addressed a letter to Messrs.

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Gregg, stating that the said deed of gift, which was in the possession of Messrs. *Gregg*, had been revoked, and that he had conveyed his property to trustees for all his family, and requesting that the deed of gift, with all other deeds and papers of *R. H. Procter*, might be delivered up on the usual terms. The letter did not state that the power of attorney to *Gilbert Procter* had been revoked.

At this time Messrs. *Gregg* had in their hands a considerable sum of money belonging to *R. H. Procter*, and also a bill of costs against him. On receiving the letter of the 14th of June they sent in to *Gilbert Procter* a bill of costs, and drew a cheque for the balance which remained in their hands, amounting to £741, belonging to *R. H. Procter*, which they paid over to *Gilbert Procter*.

The day after this was completed they wrote to *Prance* to the effect that they had no money in their hands belonging to *Procter*, and no bill of costs against him, and claimed nothing as due from him.

On the 23rd of June, after receiving the answer of Messrs. *Gregg*, the common order for taxation was taken out by *Prance* on behalf of his client, by which it was ordered that the solicitors, Messrs. *Gregg*, "within a fortnight of the notice hereof" should deliver up their bill of costs and produce the books and papers in their custody.

On the 30th of June this order was served on Messrs. *Gregg*, but without the proper indorsement required by Cons. Ord. XXIII. r. 10.

On the 19th of July, being five days after the expiration of the time within which the order, if regular, should have been obeyed, the order was re-served with the proper indorsement, which was as follows: "Take notice, that if you neglect to obey this order by the time therein specified, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery."

No notice was taken by Messrs. *Gregg* of the order, and, accordingly, on the 2nd of October, the attachment was issued on an affidavit by *R. H. Procter* of non-compliance with the order of course. This affidavit was prepared by *Prance*, and sent down by him to *Thomson*, a solicitor at *Kendal*, whom he employed as his agent for this purpose only, that it might be sworn. This affidavit

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was sworn by *R. H. Procter* before *Thomson* himself on the 2nd of September, being a month before the attachment was issued.

The object of the present motion was to set aside the writ of attachment as irregular for the following reasons: First, because the order of course was taken out after Messrs. *Gregg* had given notice to *Prance* that they had no bill of costs, and had no money of the client's in their hands; secondly, because the order had never been properly served, inasmuch as the order served on the 30th of June had no proper indorsement, and the second service on the 19th of July was nugatory; thirdly, because the affidavit on which the attachment was issued was improperly sworn before the agent of the solicitor employed in the matter; and lastly, because a month had elapsed between the time when the affidavit was sworn and the issuing of the attachment.

A large amount of evidence was gone into, chiefly relating to the circumstances previous to the time when the order for taxation was taken out, to the alleged incompetency of *R. H. Procter* to manage his affairs, and to various charges against *Prance* of alleged misconduct in relation to the affairs of *R. H. Procter*.

Mr. *Jessel*, Q.C., Mr. *Lopes*, Q.C., and Mr. *Ingle Joyce*, in support of the motion:—

The writ of attachment against Messrs. *Gregg* is irregular, and ought to be set aside.

Messrs. *Gregg* had, before the order of course was served upon them, delivered their bill of costs to *Gilbert Procter*, who was acting under a power of attorney from his uncle, and they retained out of the money in their hands the amount due in respect of it, and paid over the balance to the person authorized to receive it, so that the order for taxation ought not to have been taken out.

Further, the order, when obtained, was served without the indorsement required by Cons. Ord. XXIII. r. 10; and the second service was null and void, as the order required to be obeyed within fourteen days from the "service thereof," which words could not apply to the order subsequently served. The leave of the Court should have been obtained for the order to be re-served, as in *Re Bowen* (1), or else a new order should have been taken out.

(1) 11 W. R. 607.

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Another ground of irregularity is, that the affidavit on which the attachment was issued was sworn before the agent of *Prance;* and such an affidavit cannot be received.

Lastly, the evidence in the case shews that the conduct of *Prance* in the matter, and in the circumstances which led to it, was vexatious and improper, and such as to justify the Court in exercising its jurisdiction in making him pay the costs of this application, as in the cases of *In re Hogan* (1), *Ex parte Cuthbert* (2), *Aubrey* v. *Aspinall* (3), *Pearse* v. *Cole* (4), and *Bromage* v. *Davies* (5).

Mr. *Roxburgh*, Q.C., and Mr. *Prior*, for Mr. *Prance*.

Mr. *Southgate*, Q.C., and Mr. *Freeling*, for Mr. *R. H. Procter*:—

The technical objections to the writ of attachment cannot be sustained.

The fact of a second copy of the order being served with the indorsement in consequence of the first service being informal does not invalidate it, for the words "after notice hereof" must mean "after service:" the order, therefore, was properly served on the 19th of July, and an attachment can be issued on such an order being neglected: *Ex parte Belton* (6).

The objection to the form of the affidavit is equally groundless. *Thomson*, before whom the affidavit was sworn, was not in the position of a solicitor in the cause, or one who had prepared the affidavit. He was a solicitor at *Kendal*, to whom *Prance*, who had prepared the affidavit, sent it down for him to get it sworn; and it was sworn by *Procter* before *Thomson* himself, who was merely the agent of *Prance* for this particular purpose. This is quite a different case from those where affidavits have been refused on the ground of being sworn before the solicitor on the record, or his clerk, as in *Re Hogan* and *Wood* v. *Harpur* (7). *Foster* v. *Harvey* (8) shews clearly that the rule of the Court would not exclude such an affidavit as this. Further, it is quite immaterial

(1) 3 Atk. 813.
(2) 1 Madd. 78.
(3) Jac. 441.
(4) 16 Jur. 214.
(5) 4 Jur. (N.S.) 683.
(6) 25 Beav. 368.
(7) 3 Ibid. 290.
(8) 11 W. R. 899; 2 N. R. 443; on app. 3 N. R. 98.

that a month elapsed after the affidavit was sworn before the writ of attachment was served.

On the whole case there is no ground whatever for setting aside the writ of attachment.

Mr. *Jessel*, in reply.

Dec. 10. LORD ROMILLY, M.R.:—

This is a motion to discharge an attachment taken out to enforce obedience to the common order to tax, and for the production of deeds and papers, and delivery and taxation of a bill of costs.

The notice of motion is most singular, for it prays that the solicitor who appears for, and conducts the business of, the client for whom the order was obtained may pay the costs of the application, not because he has fraudulently, or for any sinister purpose of his own, taken out this attachment, but because his general conduct as a solicitor for his client has been improper, and vexatious and injurious to the Messrs. *Gregg*, who make this motion. No authority has been cited which supports any such proposition. In every case where the Court has made the solicitor pay the costs of such proceedings, he has been proved to be guilty of misconduct in the matter itself sought to be set aside; and in the present case none such is to be found. No doubt jurisdiction may be given to this Court to inquire into the misconduct of a solicitor. It is, in fact, so to say, of every-day occurrence, but it must be done by a Petition to suspend him for misconduct, or to strike him off the roll of solicitors, and this Petition must give him distinct notice of the case he has to meet. Sometimes, though rarely, a solicitor does misconduct himself in the conduct of a matter before the Court, of which the Court itself has cognizance, and thereupon the Court has occasionally called upon the solicitor to shew cause why he should not be suspended or struck off the rolls. But that case does not arise here. This is an application to discharge an attachment on the mere ground of irregularity; and the Court is asked to make him pay the costs, not on the allegation that he has done anything negligently or wrong as connected with the attachment, but on the allegation that many years ago,

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and in other matters, he misconducted himself; and he knows nothing of the reasons for asking that he should pay the costs until an affidavit is filed in support of the application. A more irregular application I never saw; and the motion, so far as it asks that *Prance* is personally to pay the costs, must be dismissed with costs.

The attachment is quite a separate and distinct matter. The facts are these:—[His Lordship then stated the facts, and continued:—]

One of the objections is, that the attachment is bad, because this attachment is taken out after notice is given by the Messrs. *Gregg* that they had no bill of costs, and that they had no money of their client, Mr. *Procter*, in their hands. I am of opinion that this objection wholly fails.

It was the duty of Messrs. *Gregg*, after the receipt of the letter of the 19th of June, to ascertain what authority had been given by *R. H. Procter*, and whether it had not taken away from *G. Procter* all authority to act for him, as was to be inferred from the contents of Mr. *Prance's* letter. But assuming that, under the power of attorney, the payment of the £741 was a good payment, the bill of costs, it is clear, is subject to taxation, assuming the power of attorney to be proved and unrevoked; and though it would not, under ordinary circumstances, be taxable under a common order to tax, but would require some special application, the Court would not require solicitors, by a proceeding of this description, to compel the client to make a separate application, or an application under the third party clause of the statute.

[His Lordship then considered the defence set up of the alleged incapacity of *R. H. Procter*, which he considered was irrelevant, and not supported by the evidence.]

The next objection to the attachment is, that it is said to be bad because the order to tax had become useless in consequence of its not having been served, or properly served, it being the peculiarity of the common order to tax, that if it is served irregularly, and without the proper indorsement, it cannot be served again without the leave of the Court, and that either that leave must be obtained or a new order taken out. Here the order was served on Messrs. *Gregg* on the 30th of June, 1869, but it was served without the

proper indorsement, without which an attachment cannot issue. On the 14th of July, the fourteen days within which the order ought to have been obeyed had expired, and on the 19th of July the order was re-served with the proper indorsement. It is argued that the first service was notice within the terms of the order, and that, consequently, the subsequent order to comply with the order within fourteen days after notice had been previously served was unjustifiable and useless.

This objection, in my opinion, if valid, would apply if an application had been made to the Court for an order, because the Court cannot give leave to any one to call on another to do that which is impossible, and if the objection is sound, the order could not be served more than fourteen days after notice. But in my opinion there is nothing in the objection. The order is, that they shall deliver the bill of costs within fourteen days after notice of it, and the form of the indorsement is: "Take notice, that if you, the within-named Messrs. *Gregg*, neglect to obey this order by the time therein specified, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery." The order is served with this notice, that if they do not obey the order by the time "therein specified:" what is the time therein specified? It is within fourteen days "after notice hereof"—that is, notice of the document served, not notice of a previous document, but notice of the document served. It does not say, nor does it mean, after notice of the document which was improperly served, or served without the proper indorsement, nor does it mean within fourteen days after notice, or, which is the same thing, knowledge, that a common order to tax had been taken out. If so, any ordinary information of the fact, without the service of any order at all, would cause the fourteen days to begin to run. This is not, in my opinion, the meaning of the indorsement. I think the party may serve the order over again, as in the case of other orders, with the proper indorsement upon it, and that this objection to the attachment also fails.

The next objection is, that the attachment is bad because it was obtained on the affidavit of the client, *R. H. Procter*, which was sworn before a solicitor who was the agent of Mr. *Prance*, the solicitor in this matter of the person swearing the affidavit. Now

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this is an objection which, in my opinion, does not apply to a case of this description. The rule is, that an affidavit must not be sworn before, or an oath administered by, a solicitor who is acquainted with all the facts of the case, and who is employed to conduct it to a successful termination; but if this be not the case, then the agent of the solicitor employed, who is ignorant of the facts of the case, may administer the oath.

This is, in my opinion, quite settled by the case of *Foster* v. *Harvey* (1). The facts of the case were these: The Plaintiff was a partner in the firm of *Foster, Burrow, & Co.*, solicitors at *Norwich*. His solicitors upon the record were the town agents of that firm, appearing, however, as independent solicitors, and not as agents. The Plaintiff made an affidavit in the cause which was sworn before one of his own clerks. That was held perfectly good, and the present Lord Chancellor there said, "Lord *Hardwicke* had said" in *Re Hogan* (2) (which is always referred to in these cases) "there were other reasons for the rule, and one of these might be that it was necessary for the protection of the witness. It naturally fell to the solicitor in the cause to prepare the affidavits; it was the duty of the person who administered the oath to explain the meaning of the affidavit to the witness; and this duty was not likely to be very effectually discharged by the person who prepared the affidavit, who would, of course, explain it in the sense which he himself attached to it." Then he cited the cases of *Read* v. *Cooper* (3) and *Williams* v. *Hockin* (4), to shew that at law the rule only prevented the attorney in the cause or his clerk from administering the oath, adding that "it had not been extended in equity, and he would not be the first to do so. The plain rule was that the solicitor in the cause, or his clerk, by whom the affidavits had to be prepared, ought not also to administer the oaths; but a person *dehors* the cause was not prevented from administering them because he was the salaried servant of the Plaintiff."

When the same came on on appeal, the decision was to the same effect, and Lord Justice *Turner* is reported to have observed as follows (5): "It would appear that the principle on which a

(1) 2 N. R. 443.
(2) 3 Atk. 813.
(3) 5 Taunt. 89.
(4) 8 Ibid. 435.
(5) 3 N. R. 98.

solicitor on the record or his clerk could not take an affidavit was that he and his clerk must be assumed to have an intimate knowledge as to the evidence which would prove material or immaterial to the success of the cause, but that principle did not apply in the case of a person merely in the employment of the Plaintiff. There was no ground for assuming that such a person was acquainted with the circumstances connected with the suit in consequence of such relationship. Were such a supposition to be maintained it would be impossible to predicate to what extent the principle might not be extended. He considered that the rule in question ought to be confined to the case of solicitors on the record and their clerks."

I am of the same opinion; and observe what are the facts in this case. *Prance* in *London* prepares the usual affidavit of course, to be sworn by *R. H. Procter,* that the order of course has not been complied with, and sends it to *Thomson,* his agent at *Kendal,* to get it sworn, and *Thomson,* who is the agent of *Prance* for that purpose, administers the oath. There is no dispute or doubt about the truth of the affidavit, which is merely the formal affidavit that Messrs. *Gregg* had not obeyed the order. The substance of the objection has in such a case as this no application, because it is mere technicality, and the words of Lord Justice *Turner* apply. I think that the affidavit on which the order was made was good, and that the attachment is not erroneous in that respect.

The fourth and last objection is, that the affidavit is insufficient for this reason, viz., that the affidavit of non-compliance with the order of course by Messrs. *Gregg* is made on the 2nd of September, 1869, and the attachment does not issue till the 2nd of October, 1869, a month later, and that consequently the order might have been complied with in the meantime. I am of opinion that there is nothing in this objection. It is nowhere contended that the affidavit was not true; and if the order had been obeyed in the meantime it was for Messrs. *Gregg* to state the fact. They do not do so, nor do they now pretend that it was obeyed, and consequently the affidavit is, in my opinion, sufficient.

In all respects, therefore, in my opinion, the objections fail. I cannot allow a solicitor in answer to the order for delivery and taxation of his bill of costs, to say, "I have, since you applied for my

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bill of costs and the papers to be delivered to you, delivered both to another person who, under an instrument of an older date, had authority from you formerly to receive both and to settle the bill and cash account," the more so when the solicitor is previously informed that the client has given the authority to another person for both purposes. Whether the payment of the £741 to Mr. *Gilbert Procter* was or was not a good payment, and one that discharges Messrs. *Gregg*, I offer no opinion. That will be determined by the Taxing Master in taking the cash account in the first instance, and probably, if the parties differ about it, by me subsequently; but at present I decline to go into it further than to say that it is no answer to the order to tax, and that it does not entitle the Messrs. *Gregg* to discharge the attachment. In fact the application is, in my opinion, in every respect irregular and improper. It is improper in seeking to disobey the order on the ground that the client is imbecile, and endeavouring to have that issue tried before me on this occasion; it is improper in making an express attack on Mr. *Prance's* former life and conduct on a matter wholly apart from the matter of this attachment; it is also erroneous for bringing forward a series of frivolous and technical objections to the writ, no one of which in my opinion has any weight or substance. The consequence is, that I think it proper to dismiss this motion with costs.

Solicitors for the Applicants: Messrs. *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Respondents: Mr. *Chidley;* Mr. *Prance.*

In re RUSH, A SOLICITOR.

M. R.
1870
Jan. 15.

Solicitor and Client—Order to tax—Default in Payment of Balance due from Solicitor—Attachment—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

Default by a solicitor in payment of a balance found due from him upon taxation of his bill of costs under the common order for that purpose, is default in payment of a sum of money ordered to be paid by the solicitor in his character of an officer of the Court within the meaning of the *Debtors Act*, 1869, s. 4, subs. 4, and an attachment may be issued against him.

6 Ch. 155
7 Ch. 524-5
Post 174.

UPON the taxation, under the common order for that purpose, of the bill of costs rendered by *G. R. Rush*, a solicitor, to *G. C. S. Durant*, his client, a balance of upwards of £27,000 was found due from the solicitor to his client, and an order was made for the payment of this balance. The solicitor failed to comply therewith.

Mr. *F. H. Colt* now applied that a writ of attachment might issue against *Rush*, stating that a difficulty had been raised by the Clerk of Records and Writs on account of the provisions of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), which provides (sect. 4) as follows:—"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment . . . (4). Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order." He submitted that as the order for payment was made under or by virtue of the summary jurisdiction which the Court has over solicitors this case was excepted from the general enactment.

LORD ROMILLY, M.R.:—

The wording of the Act is somewhat singular, but I do not think that it prevents you from issuing an attachment.

Solicitors: Messrs. *Langley & Gibbon.*

M. R. 1870 Jan. 11.

HEALEY *v.* CHICHESTER AND MIDHURST RAILWAY COMPANY.

Judgment against Railway Company—Execution against Shareholders—Practice—Form of Order—Companies Clauses Act (8 *Vict. c.* 16), *s.* 36.

Upon an application under sect. 36 of the *Companies Clauses Act*, for leave to issue execution against shareholders of a company which had been ordered to pay a sum of money and failed in doing so, the Court will give the shareholders an opportunity of questioning the validity of the order; but is not bound to do so by directing a writ of *scire facias* to issue.

THIS was a vendor's suit for specific performance of an agreement by the *Chichester and Midhurst Railway Company* to purchase certain lands.

By the order made on further consideration the Defendants the company were ordered to pay to the Plaintiffs the sum of £23,516 2*s.* 8*d.*, together with interest, and the costs of the suit.

To enforce this order the Plaintiffs issued a writ of *fi. fa.*, and recovered the sum of £86 3*s.* 6*d.*, after payment of expenses, and the sheriff returned *nulla bona* beyond this. They then issued an elegit, and recovered lands of the annual value of £27 8*s.* 9*d.*

The Plaintiffs now applied, under sect. 36 of the *Companies Clauses Act*, for leave to issue execution against the *London, Brighton, and South Coast Railway Company*, who were shareholders, and had not fully paid up their shares.

Mr. *Eddis*, Q.C., and Mr. *Jason Smith*, for the Plaintiffs, cited *Ex parte Warkworth Dock Company* (1); *Ilfracombe Railway Company* v. *Lord Poltimore* (2).

Mr. *Fry*, Q.C., for the *London, Brighton, and South Coast Railway Company*:—

We know nothing of this suit, and have never seen either the decree or the order now sought to be enforced. We must, therefore, be allowed some opportunity of questioning their validity; and the only way of doing this effectually is by directing a writ of

(1) 18 Beav. 629. (2) Law Rep. 3 C. P. 288.

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scire facias to issue against us. That was decided to be the proper course in *Hitchins* v. *Kilkenny Railway Company* (1).

Mr. *Eddis* objected to this course as likely to cause great delay.

THE MASTER OF THE ROLLS ordered execution to issue against the *London, Brighton, and South Coast Railway Company* unless cause were shewn to the contrary on or before the second seal in the sittings after the present term; the costs of the present application to abide the event.

Solicitors: Mr. *E. Fuller;* Messrs. *Baxter, Rose, Norton, & Co.*

M. R.
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Jan. 15.

In re LONDON AND SCOTTISH BANK. *Ex parte* LOGAN.

Company—Winding-up—Manager—Termination of Engagement—Compensation.

By the articles of association of a company, *L.* was appointed manager; and it was provided that if he should at any time be deprived of or removed from his office for any other cause than gross misconduct the directors should pay to him a certain sum within one month from the time of his removal. The company was ordered to be wound up:—

Held, that *L.* was entitled to prove in the winding-up for the sum specified by the articles without any such deduction being made as in *Yelland's Case* (2).

BY the articles of association of the *London and Scottish Bank* it was provided that Mr. *William Hugh Logan* should be the managing director of the company's affairs in *Scotland*, and in the north of *England* and elsewhere, at a salary of not less than £800 per annum from the date of the registration of the company, and until a dividend should be declared out of the net profits of the company's business of £5 per cent. per annum, when such salary should be advanced to £900, and also a further sum of £100 for every additional £1 per cent. which the net profit of the business should enable the company to declare above £5 per cent. per annum; and it was further provided as follows: "In the event of the said *William Hugh Logan* being at any time deprived of or removed

(1) 10 C. B. 160. (2) Law Rep. 4 Eq. 350.

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from his office for any other cause than gross misconduct, the directors shall pay to him as compensation for loss of office a sum equal to three years' salary at the rate of salary which on the quarter-day last preceding such termination of his engagement shall be payable to him, such sum to be paid within one month from the time of such removal."

The company was ordered to be wound up, and *Logan* brought in a claim in the winding-up for three years' salary at the rate payable to him on the quarter-day immediately preceding the commencement of the winding-up. The claim was adjourned into Court.

Mr. *Roxburgh*, Q.C., and Mr. *Locock Webb*, for *Logan* :—

It is now settled by *Yelland's Case* (1), and *Ex parte Clark* (2), that in such cases as this there is a right to damages against the company, and the only question is, how the amount of damages is to be ascertained. Here the parties have themselves assessed the the amount, and, consequently, Mr. *Logan* is entitled to prove against the company for the amount he claims.

Sir *R. Baggallay*, Q.C., and Mr. *Lawson*, for the official liquidator :—

In *Yelland's Case* and *Ex parte Clark* the manager was engaged for a term of years: here he is not; consequently the principle of those cases does not apply.

Further, the provisions of the articles of association do not apply in the events which have happened. Those provisions clearly point to the event of Mr. *Logan* being removed from office while the company was a going concern, and not to the case of a winding-up.

At all events a deduction must be made, as in *Yelland's Case*, on the ground of Mr. *Logan* being at liberty to obtain a fresh appointment.

Lord Romilly, M.R. :—

I think Mr. *Logan* is entitled to prove against the company for the amount claimed by him. I cannot distinguish the case in principle from *Yelland's Case* and *Ex parte Clark*. It is part of the contract between *Logan* and the company that if *Logan* is

(1) Law Rep. 4 Eq. 350. (2) Law Rep. 7 Eq. 550.

deprived of his office the company are to pay him a sum equal to three years' salary, provided the removal from office is not occasioned by gross misconduct. That is a contract to be construed most strictly against the company; and I think *Logan* is entitled to his claim, without any deduction being made as in *Yelland's Case* (1); for suppose that while the company was a going concern they had wished to remove him because they wished to have a better man as manager, they would have had to pay him three years' salary, and he might have engaged himself to another company the very next day.

M. 1870 *In re* LONDON AND SCOTTISH BANK. *Ex parte* LOGAN.

Solicitors: Messrs. *Lawrance, Plews, Boyer, & Baker;* Messrs. *Redpath & Holdsworth.*

DEARE *v.* SOUTTEN.

M. R. 1869 *Dec.* 15.

Husband and Wife—Desertion—Advances to Wife for Necessaries—Right to recover from the Husband.

A person who has advanced money to a married woman deserted by her husband for the purpose of, and which has been actually applied towards, her support, is entitled in equity, though not at law, to recover such sums from the husband.

THIS was a suit to recover from the Defendant, who had deserted his wife, *Mary Soutten*, the sums advanced to her by the Plaintiff for, and actually applied in the purchase of, necessaries.

At the time of her marriage *Mary Soutten* was entitled to a sum of stock, and had since become absolutely entitled to sums of stock of considerable amount, and to an absolute interest (defeasible in the event of her dying without issue) in a sum of £9936 stock, standing in the names of trustees.

The Defendant had obtained possession of the whole of his wife's property, except the last-mentioned sum of stock, and had deserted his wife and ceased to maintain her, and she was then living apart from her husband.

In February, 1868, *Mary Soutten*, by her next friend, filed a bill against her husband and the trustees of the sum of £9936 stock, praying that a proper settlement on her of the income

(1) Law Rep. 4 Eq. 350.

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thereof might be made by the order of the Court, and that the trustees might be ordered to pay the dividends to her.

When the cause came on for hearing, it appeared that *Soutten* received the dividends which became due on the 5th of July, 1868, and refused to apply the same for his wife's maintenance; and the Court, considering that no order could be made as to those dividends, directed the subsequent dividends to be paid to *Mary Soutten* during her life.

The bill stated that up to the 5th of January, 1869, when the next dividends became due, *Mary Soutten* was without any means of support, and that during that time the Plaintiff paid to her for her maintenance the sums of money in the bill mentioned, amounting to £192, which were paid to her exclusively for her maintenance, and had been actually applied by her in the purchase of and payment for her maintenance and support, and for rent, rates, and taxes of the house in which she lived.

The bill charged that the Defendant was bound in equity to repay to the Plaintiff, who was advised that he had no remedy at law, the sums he had so advanced, and prayed that the Defendant might be ordered to repay the same accordingly.

Mr. *Archibald Smith*, for the Plaintiff:—

The Plaintiff having advanced money to a married woman for her support when she was deserted by her husband, and left without the means of support, is entitled to recover from the husband the amount so advanced, and proved to have been applied for her maintenance, and the Court will entertain a suit for that purpose.

The law on this subject was considered in *Jenner* v. *Morris* (1), where, following *Harris* v. *Lee* (2), it was held that a person making advances to a deserted wife to enable her to supply herself with necessaries, though he had no remedy enforceable at law against the husband for the advances, had his remedy in equity for the money actually applied in the purchase of necessaries.

A very similar case to the present, *Hutchinson* v. *Standley*, came before Lord *Bathurst*, and is thus stated in the *Annual Register*, 1776 (3): "A case of an extraordinary nature came on in the Court of Chancery upon a bill brought by an apothecary at *Bath*

(1) 1 Dr. & Sm. 218; 3 D. F. & J. 45. (2) 1 P. Wms. 482. (3) Page 117.

1 Ves. Jun. 375.

against a gentleman of *Huntingdonshire*, for the recovery of £100 lent to the gentleman's wife. The merits were briefly as follows: the Defendant, in possession of about £4000 per annum, married a lady in 1757, who brought him £20,000. In the year 1769, being in a very ill state of health, she was advised by her physicians to go to *Bath*. The Defendant shewed much reluctance, raised several objections to her going, and seemed likewise not much pleased with her being obliged to use his new chaise; but at length he consented, gave her £50 to pay her expenses, and afterwards remitted her more money, but in very small sums, the greatest remittance not exceeding £20, so that the lady, notwithstanding the most frugal manner of living, was obliged to exceed the allowance, and borrow £100 of the Plaintiff to clear her bills before she could leave *Bath*, giving him a draft for the same upon her husband. The only extravagant article which appeared against her was half a guinea for some moss roses. In the summer after her return she grew worse and died. The Plaintiff then applied to the Defendant in town for payment, but was told to seek his remedy at law, the Defendant being determined, without compulsion, not to pay a shilling; but upon hearing counsel on both sides, the Court decreed payment of the money with full costs of the suit."

It appears from the Registrar's book (1775 A., 216 b), that the statement of the case in the *Annual Register* is accurate, and that the prayer of the bill in that case was, "That the Defendant may pay to the Plaintiff £100, with interest thereon from the time of the Plaintiff so advancing the same;" and the decree was in the following terms: "The Defendant waiving any inquiry touching the said sum of £100 claimed by the Plaintiff, his Lordship doth order and decree that the Defendant do pay unto the Plaintiff the said sum of £100, with interest thereon from February, 1771, and the costs of this suit."

The Plaintiff in this case is entitled to similar relief.

Mr. *Idle*, for the Defendant:—

The Court has no jurisdiction to grant the relief sought by the Plaintiff: *May* v. *Skey* (1). In *Grindell* v. *Godmond* (2) it was

(1) 16 Sim. 588. (2) 5 A. & E. 755.

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held that when a wife, ill treated by her husband, indicted him for assault, a person making advances for her to her attorney to enable him to undertake the prosecution, could not recover the amount from the husband as money applied to provide her necessaries.

The advances made by the Plaintiff ought to have been provided for in the suit, not thrown upon the Defendant afterwards. The law on the subject is thus stated in *Bright's* Law of Husband and Wife (1): "Since the Court will appropriate the wife's equitable property for her support when she has been deserted by her husband, if a person advance her money for her maintenance, under the above circumstances, the Court will repay it to the creditor out of her estate."

In the case of *In re Ford* (2) the whole of the accumulations of an annuity to which a wife was entitled who had been supported by her sister while deserted by her husband, were ordered to be paid to the sister. But it does not follow that the sister could have recovered from the husband.

In *Rawlyns* v. *Vandyke* (3) the husband was held not to be liable for necessaries supplied to the wife after the tradesmen had notice from the husband that she had a separate maintenance.

LORD ROMILLY, M.R.:—

I am of opinion that this is a proper suit, and that the Plaintiff is entitled to a decree. The cases cited on behalf of the Defendant have no application, and *May* v. *Skey* (4) is overruled by *Jenner* v. *Morris* (5). The Defendant is bound to repay what the Plaintiff has advanced, but he is entitled to an inquiry as to the payments if he desires it, which would not be limited to the sums specified in the bill.

No inquiry being asked, the decree, as drawn up, ordered payment of the £192, and the costs of the suit.

Solicitors for the Plaintiff: Messrs. *Boys & Tweedies.*
Solicitor for the Defendant: Mr. *Mitton.*

(1) Page 258.
(2) 32 Beav. 621.
(3) 3 Esp. 250.
(4) 16 Sim. 588.
(5) 3 D. F. & J. 45.

KNOX *v.* TURNER.

V.-C. S.
1869
Nov. 4.
1870
Jan. 12.

Grant of Annuity—Policy of Assurance—Covenant to pay Premiums—Right of Grantor on Redemption.

The circumstances under which the grantor of an annuity is entitled on redemption to have a policy of assurance effected on his life by the grantee delivered up, considered.

Gottlieb v. *Cranch* (1), and *Courtenay* v. *Wright* (2), discussed.

AN indenture, dated the 26th of June, 1839, recited that *Brownlow William Knox*—the Plaintiff in this cause—was under a settlement, and under the will of Dame *F. Sutton*, entitled during his life to the annual proceeds of certain sums of stock specified, amounting in the whole to over £87,000; that he had contracted with *William Turner* for the absolute sale to him of an annuity of £318 sterling, to be paid to *William Turner*, his executors, administrators, or assigns, during the life of the Plaintiff, but repurchaseable upon the terms thereinafter expressed, and that the sole and *bonâ fide* consideration to be given for the purchase of the annuity was the sum of £3999 sterling; that upon the contract for the sale and purchase of the annuity it was agreed that the same should be secured by an assignment unto *William Turner*, upon certain trusts, of the proceeds of the said several sums of stock; and that upon the contract for the sale and purchase of the annuity it was further agreed that the same should be secured by a judgment to be entered up against the Plaintiff at the suit of *William Turner* by means of a warrant of attorney at the costs of the Plaintiff. The deed witnessed that in consideration of the sum of £3999 paid by *William Turner* to the Plaintiff, he covenanted that he would during his life pay unto *William Turner*, his executors, administrators, or assigns, the annuity of £318 by equal half-yearly portions, commencing on the 26th of December, 1839, and he assigned the annual proceeds which should during his life accrue in respect of the several sums of stock unto *William Turner*, his executors, &c., upon trust to permit the Plaintiff to receive them until the annuity

(1) 4 D. M. & G. 440. (2) 2 Giff. 337.

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should be in arrear for thirty days; but in case it should be in arrear, then upon the trusts expressed for enforcing payment by mortgage, sale, or otherwise; and he also covenanted with *William Turner* that he would, when required by him personally, attend at any office of insurance in *London* or *Westminster*, to the end that a policy of assurance might be obtained by and at the expense of *William Turner*, his executors, &c., on the life of the Plaintiff. The Plaintiff further covenanted that he would not at any time during the continuance of the annuity go on the seas or in parts beyond the seas, or enter, or engage, or be employed in actual service in any military or naval capacity without giving to *William Turner*, his executors, &c., as early notice thereof as might be; and that in case *William Turner*, his executors, &c., should have previously assured, or should assure, any sum of money not exceeding £3999 on the life of the Plaintiff, and should pay any additional rate of assurance by reason of the Plaintiff going on the seas or beyond the seas, or entering, or engaging, or being employed in actual service in any military or naval capacity, he (the Plaintiff) would pay to *William Turner*, his executors, &c., all such sums of money as he or they should pay as and for additional premiums, and all such sums should be raiseable under the trusts; and it was agreed that in case the Plaintiff or his assigns should at any time after the expiration of one year from the date of the deed be desirous of repurchasing the annuity, and should give to *William Turner*, his executors, &c., three months' notice of such desire, and upon the expiration of such notice should pay him or them the sum of £3999, and all sums of money which should be due in respect of costs incurred in the execution of the trusts, then *William Turner*, his executors, &c., should accept the sum of £3999 as and for the price of repurchase of and satisfaction of the annuity, and after such repurchase the annuity should cease, and the annual proceeds assigned should be re-assigned to the Plaintiff or his assigns, and satisfaction should be acknowledged on the judgment at the costs of the Plaintiff.

Contemporaneously with the execution of the deed judgment was entered up upon the warrant of attorney against the Plaintiff, and also contemporaneously with the execution of the deed a policy of assurance on the life of the Plaintiff for the sum of £4000,

dated the 26th of June, 1839, was effected in the name of *William Turner* in the *Legal and General Assurance Office.*

William Turner died on the 10th of January, 1867. The Defendants were his widow and the assignees of the annuity and the policy.

On the 30th of April, 1868, in pursuance of notice, the Plaintiff repurchased the annuity, and paid the money for such repurchase to the Defendants, who thereupon re-assigned to the Plaintiff the annual proceeds of the said several sums of stock.

The Plaintiff required the Defendants to assign to him the policy of assurance, and the moneys thereby assured, and the bonuses thereon, but they refused to do so on the ground that they were absolutely entitled to them. The repurchase of the annuity was completed without prejudice to the question whether the Plaintiff or the Defendants were entitled to them. The Defendants still refusing to assign the policy, and having threatened to surrender it to the office for the sum of £2110, and to apply that sum for their own benefit, the Plaintiff, in June, 1868, filed this bill for a declaration that he was entitled to the said policy on his life and the moneys thereby assured, and the bonuses thereon, and for a decree against the Defendants to assign the same to him.

The evidence of the Plaintiff in support of an allegation in the bill was, that though the transaction was in form the grant of an annuity, it was in fact a loan of the sum of £3999 at interest, and that in fact it was agreed between him and *William Turner* that, as part of the security for the same sum and interest, an assurance on his life should be effected in the name of *William Turner*, but at his (the Plaintiff's) costs, and that the amount of the annuity should be, and the same was fixed so as to include the amount of the premiums of such assurance.

The evidence on the part of the Defendants was, that on the 4th of June, 1839, the solicitor at that time of the Plaintiff wrote to Messrs. *Stone & Turner* to the effect that a client of his was entitled for life to the dividends of certain funds, specifying them, standing in the names of three trustees, and he said, "The age of my client is thirty-five, and I propose to borrow £4000, for which an annuity of £318 will be granted, to be repurchaseable at option, after the expiration of one year, upon giving three months' notice

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and repayment of the principal. . . . The only incumbrances affecting the trust funds are an annuity of £116 granted in consideration of £1100, and an annuity of £196 granted in consideration of £2000, to be both repurchased out of the £4000 now to be raised. I will thank you to consider the above proposal, and to let me know if you can forthwith furnish the loan required." Messrs. *Stone & Turner* in the first instance applied to the *Clerical, Medical, and General Life Assurance Society* for the required sum, and the reply of the secretary was: "Your proposal to borrow for Captain *Knox* £4000, by way of mortgage and assurance on the securities stated in your letter, was taken into consideration by a board of directors, and I am instructed to inform you that the board agree to lend the sum required at 4½ per cent. besides assurance, provided the office in which his life may be assured will agree to put an indorsement on their policy to protect the office in case Captain *Knox* goes beyond the limits of such policy without acquainting this society of it." The office in which it was intended to assure Captain *Knox's* life refused to put such an indorsement on the policy, and consequently the *Clerical, Medical, and General Life Assurance Society* declined to advance the money, and it was subsequently advanced by *William Turner* on the terms originally proposed. The first premium and duty amounted together to £116 3*s.* 4*d.*, which was advanced by *Henry Scott Turner* for *William Turner*, and paid by a cheque on his own bankers, and the amount was afterwards repaid by *William Turner*. A sum of £200 was agreed to be paid by the Plaintiff in respect of the costs connected with the preparation of the deed and the negotiation of the purchase of the annuity. This was an arrangement between Mr. *Stone* and the solicitor of the Plaintiff, and consequently no bill of costs was rendered. The £200 included the costs of investigating the Plaintiff's title to the security for the grant of annuity, of the repurchase of the two annuities, and of the preparation of the deed, and of the warrant of attorney and judgment, and the stamp duty of £40 thereon, and the procuration fee of £20 upon the advance.

Mr. *Greene*, Q.C., and Mr. *Townsend*, for the Plaintiff:—

The transaction in this case, as proved by the evidence, was,

though in the form of a grant of annuity, in fact a loan at interest. It must be observed that the Plaintiff covenanted that he would if he went abroad pay any additional premium, and how therefore can it be successfully contended that he has no interest in the policy, or that the policy is not a part of the security for the debt? This case is therefore distinguishable from that of *Gottlieb* v. *Cranch* (1). If the policy was not part of the security for the loan, on what principle could the Plaintiff be charged with any additional sum paid by *Turner* as premium? This case is governed by the decision in *Courtenay* v. *Wright* (2), in which it is stated that the principle to be extracted from *Lea* v. *Hinton* (3), and *Drysdale* v. *Piggott* (4)—cases decided subsequently to *Gottlieb* v. *Cranch*—was, that "where the relation of debtor and creditor subsists, and the true construction of the instruments and the evidence of the real nature of the transaction shews that the policy of assurance was effected by the creditor as a security or indemnity, if the debtor directly or indirectly provides money to defray the expense of that security, he is, on a principle of natural equity, entitled to have the security delivered up to him when he pays the debts which it was directly or indirectly, at his expense, effected to secure." [They also cited *Freme* v. *Brade* (5).]

Mr. *Dickinson*, Q.C., and Mr. *Bedwell*, for the Defendants:—

First: a policy of life assurance is not a contract of indemnity at all: *Dalby* v. *India and London Life Assurance Company* (6); *Law* v. *London Indisputable Life Policy Company* (7). The holder of the policy effected on the life of the Plaintiff paid all the premiums; but it has been contended that they were included in the annuity, and that, in fact, they were paid by the Plaintiff—the annuity being far beyond 5 per cent. on the money lent by *Turner*. There is not the slightest evidence of any such contract, and, in fact, the annuity did not include the premiums. The policy had nothing to do with the annuity from the moment of its redemption. The transaction was one of sale and purchase, and

(1) 4 D. M. & G. 449. (4) 22 Beav. 238; 8 D. M. & G. 546.
(2) 2 Giff. 337. (5) 2 De G. & J. 582.
(3) 5 D. M. & G. 823. (6) 15 C. B. 365.
(7) 1 K. & J. 223.

V.-C. S. 1869-70 KNOX v. TURNER.

the relation of debtor and creditor—taking the facts *quoad* the £3999—was never established; indeed, the redemption of an annuity is very different to the ordinary case of debtor and creditor. If *Turner* had not assured the life of the Plaintiff, could it be successfully contended that the Plaintiff could refuse to pay the difference between 5 per cent. (£200) and the £318? The answer is, there is no such contract in the deed. The Plaintiff covenanted to pay £318, and if he had refused to pay more than £200, he could have been sued at law, and he would have had no equity to an injunction to restrain the action. In every case, excepting that of *Courtenay* v. *Wright* (1), it has been held that the grantee of an annuity secured by contingent interests was entitled to the policy to prevent loss to him in the transaction. The case of *Gottlieb* v. *Cranch* (2) governs this case, and if the decision there is to stand, then the Plaintiff has no right to this policy. The cases of *Lea* v. *Hinton* (3), and *Drysdale* v. *Piggott* (4), are in some respects different to that of *Gottlieb* v. *Cranch*, upon the authority of which the Plaintiff's bill is entirely indefensible, and ought therefore to be dismissed with costs.

Mr. *Greene*, in reply:—

The facts all shew that this was a loan of money. The letter, which was the inception of the transaction, proves that the intention was to borrow £4000. The warrant of attorney enabled *Turner* to enter up judgment against the Plaintiff, and clearly shews that the relation of debtor and creditor existed. This circumstance is not found in *Gottlieb* v. *Cranch*.

1870

Jan. 12. SIR JOHN STUART, V.C.:—

This case is not distinguishable from the case of *Gottlieb* v. *Cranch*. If that case is to be considered as an authoritative decision, the duty of the Court now is to dismiss this bill. In the present case, as in the other, the question was as to the right of the grantor of an annuity, upon the repurchase of the annuity, and upon the extinction by payment of all his obligations to the grantee, to have delivered up a policy of assurance effected by the

(1) 2 Giff. 337. 6 Jur. N.S. 283 (3) 5 D. M. & G. 823.
(2) 4 D. M. & G. 440. 17 Jur. 764 (4) 22 Beav. 238; 8 D. M. & G. 546. 2 Jur. N.S. 1078

grantee pursuant to a stipulation binding on the grantor but not on the grantee. If the case of *Courtenay* v. *Wright* (1) had been brought before the Court of Appeal, the objections there suggested as to the decision in *Gottlieb* v. *Cranch* (2) might perhaps have been considered, and might perhaps have been removed on satisfactory grounds, if they are not well founded.

In the present case, as well as in *Courtenay* v. *Wright*, the arguments took a wider range, and the question was discussed on grounds beyond those which appear in the report of *Gottlieb* v. *Cranch*. In the latter case the argument was cut short, and the instruction to be derived from the report is confined to the expression of strong and clear opinions without the support of any argument, except that founded on the option given to the grantee as to the application of the money supplied by the grantor.

What seems to me unsatisfactory as to the authority of that case is, that it was assumed and stated by the Court to be a general and undisputed rule, that where the grantee of an annuity assures the life of the grantor, the policy effected belongs to the grantee. There is certainly no trace of any such general rule. If there were such a rule, as all arguments are silenced by a peremptory rule, the question presented for the decision of the Court need not have been argued. It was, however, upon the ground of the option in the grantee to apply the money of the grantor in effecting the policy that the decision was rested. There would be great force in the argument founded on the option, were it not that the terms of the transaction and the contract shew that the extra payment was unquestionably exacted for the purpose of securing and indemnifying the grantee at the expense of the grantor. The option which the grantee had of retaining the extra payment for his own benefit without effecting the policy is only the option of another mode of indemnity. The argument that the grantee might at his option sell the policy at any time before redemption, and that the grantor could not on redemption claim credit for the amount produced by the sale of the policy, is a very powerful argument to shew that the policy is not a security for the benefit of the grantor. Certainly, if the grantee exercised his option in that way he would seem to exercise a legitimate option of destroy-

(1) 2 Giff. 337. (2) 4 D. M. & G. 440.

V.-C. S. 1870 KNOX v. TURNER.

ing any right of the grantor. In this respect the policy, if it be a security held at all for the benefit of the grantor, must stand on a different footing from an ordinary security, as to which there can be no such option.

But there remains the question whether the grantor can be treated as having no interest in the policy which he supplied money to effect, if the grantee has not exercised the option of selling it. This question seems to be the same which arises on the option in the grantee not to effect any policy at all; and both questions must be resolved on considering the effect of the proviso for repurchase as part of the general transaction, and the reciprocal rights under the whole contract.

It has been argued that the grantor and grantee of an annuity of this kind do not stand in the relation of debtor and creditor. Considering the covenants and obligations of the deed, it is impossible to sustain this proposition. What is really meant is, that the grantor is not a debtor for the price of the annuity, because he is not bound to repay the price, and that the repayment by repurchase is optional. But if he exercises the option of repurchasing, he has repaid the grantee, and has extinguished his debt and obligation for payment of the annuity, and both parties are restored to their previous rights. The equity of a debtor who extinguishes and satisfies the claim of his creditor is to get back all securities exacted from him as securities for the obligation which he has discharged.

But it is said that the policy of assurance is not a security because its existence was optional, and its existence and nature as a security so peculiar, that not only its creation but its continuance was in the option of the creditor, who, while he remained unpaid, might have sold it for his own benefit without being accountable for the profit. None of these circumstances deprive the policy of its character as a security.

It is, however, said that if it be a security it never was the property of the debtor, but is property created by the creditor out of his own money and for his own benefit. The force of that argument seems to be destroyed by this consideration—that, in point of fact, and according to the terms of the contract, the debtor supplied the money which purchased the security, and was compelled

by the contract to assist in effecting the security. Property purchased with money supplied by the debtor and obtained by his active concurrence, which concurrence he was bound by the contract to give for securing the creditor, is no less a security because the creditor was not bound to procure the security, and after he procured it might, during the subsistence of the debt, sell the security without being liable to account for the proceeds. When the debtor exercises the right of repurchase, and extinguishes all his obligations to his creditor, and finds the creditor in possession of the security obtained with his money and at his expense and by his concurrence, why is the creditor to retain such a security, so obtained, when all his rights as a creditor are satisfied? Why is the equity of the debtor to have the security restored to be denied in such a case? In *Gottlieb* v. *Cranch* (1), the argument, which was stopped in the Appeal Court, was very ably urged in the Court below by the counsel for the grantor of the annuity. It mainly turned on the want of privity of the grantor as being no party to the contract on the policy. The same argument was urged in the present case, and supported by reference to the decision of the Exchequer Chamber in *Dalby* v. *India and London Assurance Company* (2), which decided that the contract on a policy of life assurance is not a contract of indemnity. That is very true as between the parties to the policy, but where the policy is effected by a creditor on a contract with his debtor, who is no party to the policy, but supplies the money and the premiums, it is an entirely different question, and unless there be some stipulation to the contrary as between the debtor and creditor, it is a security and an indemnity. And as to privity, if it be part of a written contract between a debtor and his creditor that a policy shall be effected, and money sufficient to pay the premiums be contracted to be supplied, and is supplied by the debtor, it is impossible, on any true view which has yet been shewn, to say that a debtor who has according to the contract concurred in effecting the policy and supplied the money to effect it, is a stranger and not privy to a policy effected on such a contract, or less interested in it when effected because the creditor had an option not to have effected it, and an option, while his debt was unpaid, to sell it for his own benefit. If neither

(1) 4 D. M. & G. 440. 17 Jan 1854 (2) 15 C. B. 365. 18 Jan 1825

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option be exercised, and the security at the time of payment is found in the creditor, the debtor's right seems clear, unless it can be shewn to be no security at all. A security—which a creditor is not bound to obtain—cannot be less a security when it is actually obtained. Nor can the debtor whose money is invested in purchasing the security be less interested in it because his creditor was not bound so to invest it or preserve it.

No true view can be taken of the question, which depends so much on the optional nature of the contract, unless there is embraced in the view the circumstance that the stipulation for redemption is also an option. The payment of the debt by redemption is no less an absolute satisfaction and extinction of the creditor's rights because it was optional, than his right to security becomes absolute if he has not exercised any option to destroy it—if, in fact, he exercised the option to take it and to expend the money supplied by his debtor in preserving it.

To assume that the question is decided by treating the policy as the property of the grantee of the annuity is to argue on the equivocal meaning of the word "property." That he has a property in the security is clear enough; but that his property can be considered absolute and unqualified where it is created by contract between the debtor and creditor, and created by moneys which the debtor was bound to supply for the purpose, does not seem to me to have yet been proved by any sufficient argument.

A peremptory rule would make argument unnecessary. But no such peremptory rule as was assumed by the Court of Appeal in *Gottlieb* v. *Cranch* (1) is anywhere recorded. In *Courtenay* v. *Wright* (2) the cases of *Lea* v. *Hinton* (3) and *Drysdale* v. *Piggott* (4) were considered and discussed. They are in some degree distinguishable from *Gottlieb* v. *Cranch*. But the latter case is so entirely similar to the present, that if it is to be overruled it must be overruled by the Court of Appeal. I have endeavoured to explain the difficulty I have felt as to the principle involved in the decision, in the hope that if the question occurs again before the Court of Appeal there may be a more full judicial consideration and exposition of the doctrine. In the meantime, for the reasons which

(1) 4 D. M. & G. 449. (3) 5 D. M. & G. 823.
(2) 2 Giff. 337. (4) 22 Beav. 238; 8 D. M. & G. 546.

I have stated, it is with dissatisfaction and reluctance that I feel bound to dismiss the bill in the present case. It must stand dismissed, but without costs.

V.-C. S. 1870 KNOX v. TURNER.

Solicitors: Mr. *Henry Smith*; Mr. *Montagu Turner*.

FENWICK *v.* BULMAN.

V.-C. S. 1869 Dec. 8.

Agreement and Sub-agreement—Specific Performance—Parties—Demurrer.

Vendors, to their bill against their purchaser for specific performance of, or for rescinding the agreement, made a sub-purchaser a Defendant; and the sub-purchaser afterwards filed a bill against his vendor for specific performance of his agreement, and made the original vendors Defendants.

A demurrer by the original vendors to the sub-purchaser's bill, was overruled on the ground that they had made him a Defendant to their bill.

Tasker v. *Small* (1), and *Aberaman Ironworks* v. *Wickens* (2), explained.

THE Defendants, *T. W.* and Rev. *G. R. Bulman*, on the 4th of September, 1863, being trustees for sale, entered into an agreement with the Defendant *William Wilson*, a builder, to sell to him certain freehold lands (coloured pink on the plan) situate near *Newcastle-upon-Tyne*, for the sum of £1200, and the purchaser had the option, which he exercised, of purchasing, at £300 an acre, adjacent lands (coloured green on the plan).

William Wilson, being in possession of the lands for the purpose of carrying on his building operations, on the 3rd of March, 1866, entered into an agreement with the Plaintiff *Fenwick* to sell to him two acres of the lands (coloured green) for the sum of £600. *Fenwick* was let into possession, and he had since expended nearly £3000 in the erection of a house.

The solicitor of *Fenwick* prepared a draft conveyance of the two acres, and it was settled and approved of by the solicitor of *William Wilson*, and also by the solicitors of the Messrs. *Bulman*, but owing to differences between *Fenwick* and *William Wilson* arising out of the building operations, *William Wilson* refused to execute the conveyance till certain moneys had been paid to him by *Fenwick*.

(1) 3 My. & Cr. 63. (2) Law Rep. 4 Ch. 101.

V.-C. S. 1869 FENWICK v. ULMAN.

The engrossment was, however, executed by the Messrs. *Bulman* in 1867, and since that time it had remained in their hands.

William Wilson was, in June, 1868, adjudicated a bankrupt, and the Defendant *Stephenson* was appointed creditors' assignee.

Fenwick, on the 27th of May, 1869, tendered to the Messrs. *Bulman* the sum of £678, being the purchase-money and interest for the two acres, but they declined to accept it, as they had not been paid the purchase-money comprised in their agreement with *William Wilson*.

With a view to a settlement of all differences between the parties negotiations took place, but they having failed, this bill was, on the 22nd of October, 1869, filed against the Messrs. *Bulman*, *William Wilson*, and *Stephenson*, praying that the agreement of the 3rd of March, 1866, and so much of the agreement of the 4th of September, 1863, as related to the piece of land comprised in the agreement of the 3rd of March, 1866, might be specifically performed, and that the Messrs. *Bulman* might be ordered to deliver to *Fenwick* the conveyance of the two acres.

The bill contained an allegation that on the 19th of November, 1868, the Messrs. *Bulman* filed a bill against the Defendant *Stephenson*, and against *Thomas Wilson*, who claimed to be an incumbrancer, and against the Plaintiff *Fenwick* (by amendment on the 27th of April, 1869), praying for the specific performance of the agreement of the 4th of September, 1863, by all the Defendants, or some or one of them, or in default that the agreement might be rescinded.

This was a demurrer by the Messrs. *Bulman*, on the ground that they were improper parties to the suit.

Mr. *Greene*, Q.C., and Mr. *Davey*, for the demurrer:—

The Messrs. *Bulman* are not necessary parties to this bill of *Fenwick*. The contract of which the Messrs. *Bulman*, by their bill, seek to have specific performance, is one for the purchase of the entire estate, and with that contract *Fenwick* had nothing to do. *Fenwick* is, however, a necessary party to the Messrs. *Bulman's* bill, because he has become interested in a part of the estate sold by them to *William Wilson*, and they cannot have complete relief without his presence. There is no privity between *Fenwick* and the Messrs.

Bulman to entitle him to make them parties to his suit. The authorities clearly shew that it is not proper to make persons not parties to a contract parties to a suit instituted for the purpose of having it specifically performed: *Tasker* v. *Small* (1); *Chadwick* v. *Maden* (2). There is a distinction between a suit for specific performance of a contract simply, and a suit for specific performance of or for rescinding a contract. Where a person has an interest under a sub-contract, he can obtain specific relief only against the person under whom he claims; but where a Plaintiff seeks to rescind a contract, he has a right to make all persons who he knows have acquired an interest under the contract, parties to his suit: *Aberaman Ironworks* v. *Wickens* (3). The case of *Dyer* v. *Pulteney* (4) is on all fours with this, as this bill now stands, and that case clearly shews that *Fenwick* can have no relief as against the Messrs. *Bulman*. As this demurrer rests upon the doctrine that it is not competent to a purchaser from a sub-vendor of a smaller portion of the estate which such vendor has purchased, but which he has not, in accordance with the terms of his contract, paid for, to bring the original vendor before the Court in a suit against the sub-vendor for specific performance, it ought to be allowed with costs.

Mr. *Dickinson*, Q.C., and Mr. *Marten*, for the Plaintiff, were not called upon.

SIR JOHN STUART, V.C.:—

The sub-purchaser not having obtained the performance of his contract, has filed his bill not only against his vendor, but also against the original vendors, with whom he has no contract at all. The contention that as the Plaintiff had nothing to do with the original vendors (whose contract was for the sale of the whole estate) they ought not to have been made parties to this bill, might be good if the original vendors had not, as the pleadings in this suit shew, made the Plaintiff a Defendant to their bill for the specific performance of their contract with the original purchaser. The original vendors having filed such a bill, the question now is,

(1) 3 My. & Cr. 63.
(2) 9 Hare, 188.
(3) Law Rep. 4 Ch. 101.
(4) Par. 160.

V.-C. S. 1869 FENWICK v. BULMAN.

whether they can sustain this demurrer on the ground that they are strangers to the Plaintiff's contract.

In the case of *Tasker* v. *Small* (1), Lord *Cottenham* carefully described what the meaning of being a stranger to a contract is; and looking at that case, and the facts in this, can it be successfully contended that the Plaintiff is not entitled to a right arising out of the original contract? I think not, for if that contract be not performed, he can have no performance of his contract with the original purchaser. The judgment in *Tasker* v. *Small* does not contain a word to authorize me in saying that this demurrer ought to be allowed. The sub-purchaser being made a party to the suit, which, in the alternative, prays to rescind the contract, is properly treated as having an interest in the original contract.

The *dictum* of Lord *Cairns*, in the case of *Aberaman Ironworks* v. *Wickens* (2), in reference to the decision in *Tasker* v. *Small*, if his attention had been called to the facts of that case, would probably have been qualified. But as it stands it is founded upon a misapprehension, for I know of no difference between a suit of this kind for the specific performance of a contract and a suit for rescinding a contract.

However, if I entertained any doubt in this case, it would be dispelled by the decision of Lord *Hardwicke* in *Dyer* v. *Pulteney* (3), in which the obvious equity of a sub-purchaser is clearly recognized. The question upon this demurrer is relieved from all difficulty by the fact that these demurring Defendants have made this Plaintiff a party to their bill against his vendor, and therefore I must overrule it with costs.

Solicitors: Messrs. *Cookson & Co.*, agents for Messrs. *J. & N. G. Clayton, Newcastle-upon-Tyne;* Mr. *Theodore Waterhouse*, agent for Messrs. *J. & R. S. Watson, Newcastle-upon-Tyne.*

(1) 3 My. & Cr. 63. (2) Law Rep. 4 Ch. 101-111.
(3) Bar. 160.

POWELL *v.* ROBERTS.

V.-C. S.
1869
Nov. 9.

County Court—Redemption Suit—Jurisdiction—County Courts Equity Act (28 & 29 *Vict.* c. 99).

Appeal against a decree of a County Court for redemption dismissed with costs, although the right to redeem was resisted on the ground of a sale by the mortgagee under a power which the Court (the alleged purchaser being made a party by amendment) held to be an invalid sale.

Under the *County Courts Act* (*Equity*), 28 & 29 Vict. c. 99, the County Courts have jurisdiction in a redemption suit, though the right to redeem is disputed.

THIS was an appeal from the County Court of *Denbigh.*

By an indenture dated the 1st of January, 1863, one *John Jones,* in order to secure £160, mortgaged allotments of freehold land, numbered respectively 17 and 19, to the Defendant *G. Roberts,* with a power of sale on giving six months' notice. By a second indenture, dated the 28th of November, 1862, but, in fact, executed the 28th of November, 1863, *Jones* executed a mortgage of the same allotments to the Plaintiff to secure £110.

On the 1st of March, 1866, *G. Roberts* served a notice in writing on the mortgagor demanding payment of principal and interest.

On the 3rd of March, 1866, the mortgagor executed an assignment to trustees for the benefit of his creditors.

On the 8th of March, and subsequently on the 12th of June, *Powell,* the Plaintiff, requested the Defendant not to exercise the power of sale, and offered to pay off the principal and interest. On the 21st of June, the trustees of the creditors' deed requested *G. Roberts* to sell, in order that they might wind up the estate. Further correspondence took place, and, in particular, on the 21st of July, 1866, *G. Roberts* stated he had been satisfied, as he supposed, by the assignees of the trust deed.

On the 31st of August, *G. Roberts* executed an agreement to sell the lots 17 and 19, and also another lot of which he was sole mortgagee, to *J. Carstairs Jones,* for a lump sum of £350, and by an indenture dated March, 1867, between *G. Roberts* of the first part, the trustees of the creditors' deed of the second part, and *J. Carstairs*

V.-C. S. 1869 POWELL v. ROBERTS.

Jones of the third part, lots 17, 18, and 19, were conveyed to *J. C. Jones* in consideration of £350.

On the 23rd of May, 1867, after some prior proceedings, the Plaintiff filed his plaint against *G. Roberts* alone, praying that Defendant might be ordered to convey the mortgaged premises to Plaintiff on payment of £160 and interest, and also for an injunction, and for damages.

On the 25th of June, 1867, on the plaint coming on to be heard, the Defendant *Roberts* objected that *J. Carstairs Jones*, the purchaser, was a necessary party, and the case was adjourned, with liberty to the Plaintiff to amend. The plaint was accordingly amended by adding as a Defendant *J. Carstairs Jones*, and by praying that the sale, contract, and conveyance from *G. Roberts* to *J. Carstairs Jones* might be set aside, and that the said Defendant might be ordered to reconvey the said premises to the Plaintiff upon payment of £160 and interest. The plaint also prayed for an injunction, and damages, and consequential relief. An objection was again taken that the trustees of the creditors' deed were necessary parties, and the plaint was again amended by making them parties.

On the 8th of February, 1868, the plaint came on to be heard, when the Court made a decretal order "that it appearing that the sale of allotments 17 and 19 was not within the power of sale in the mortgage of *G. Roberts*, dated the 1st of January, 1863, declare the sale void as against the Plaintiff; decree account of what was due for principal and interest; and on payment by the Plaintiff into Court of what should be certified to be due within six months after the Registrar should have presented his certificate, that *G. Roberts* should release, and *J. Carstairs Jones* convey, the premises to Plaintiff, and deliver up all deeds, and in default of payment the plaint be dismissed."

Against this order the Defendant appealed.

Mr. *Freeling*, and Mr. *A. E. Miller*, for the Appellant, contended that the County Court had no jurisdiction in a suit like the present. The Act 28 & 29 Vict. c. 99, limited the jurisdiction to mere redemption, but this plaint did not ask redemption; but that as against a purchaser for value without notice a sale might be set

aside with costs. This could not be regarded as a redemption suit, and was clearly beyond the jurisdiction of the County Court.

Other objections were also taken not requiring a report.

Mr. *Dickinson*, Q.C., and Mr. *Langworthy*, for the Plaintiff, were not called on.

SIR JOHN STUART, V.C.:—

The Act of Parliament declares that the County Courts shall have jurisdiction in all suits for redemption and foreclosure; but a suit for redemption in which the right to redeem is disputed is still a suit for redemption, and I can put no other construction on the language of the Act.

In all the text-books and reports a suit for redemption in which the right to redeem is denied is invariably treated as a redemption suit. In *Seton* on Decrees (1) I find the following: "If part of the costs of the suit have been caused by the resistance of the mortgagee to a redemption decree he will pay so much of the costs of the suit, and receive the rest." In the case before Sir *Thomas Plumer* of *Harvey* v. *Tebbutt* (2) the right to redeem was resisted on the ground that there had been a previous decree for foreclosure by the Court of Exchequer. A more formidable resistance to a right to redeem than setting up a foreclosure decree cannot well be imagined; but Sir *Thomas Plumer* treated and called the suit a suit for redemption. He says (3): "The only question is whether, upon a bill filed to redeem, this party (the mortgagee) is to be deprived of that which is usually allowed to mortgagees, namely, the payment of his costs." And the decree in that case contained a declaration that the Plaintiff ought to be let in to redeem notwithstanding the decree made in the cause. In dealing with the costs Sir *Thomas Plumer* "ordered that the Master do tax all parties the costs of this suit, so far as the same have been occasioned by the Defendant controverting the Plaintiff's right to redeem." This shews that in the view of the Court technically, as well as in the ordinary interpretation of language, a suit to redeem where the right to redeem is resisted is still a suit to redeem. On

(1) 3rd Ed. p. 376. (2) 1 Jac. & W. 197.
(3) 1 Jac. & W. 201–202.

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these grounds I am of opinion that the learned Judge of the Court below came to a right conclusion in holding that the Plaintiff was entitled to maintain the suit, and that the Court had jurisdiction to entertain it.

The learned Judge appears to have doubted whether the County Court had power to cancel the deed; but in cases of this kind there is no direction to cancel the deed. In *Harvey* v. *Tebbutt* (1) the direction was that, notwithstanding the decree, the Plaintiff should be let in to redeem.

In this case the learned Judge states that in his opinion the sale was void, and that there was no ground why the Plaintiff should not be allowed to redeem; but the decree is properly silent as to cancelling the deed, which was unnecessary.

The other objections which have been made to the decree are, in my opinion, equally unsustainable, and the appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Rooks, Kenrick, & Harston,* agents for Mr. *Adams, Ruthin.*

Solicitor for the Respondent: Mr. *Finney,*

V.-C. S. 1870 *Jan.* 20, 21.

In re BELL'S ESTATE. FOSTER *v.* BELL.

Receiver—Default in Payment of Balance—Practice—Committal—Cons. Ord. XXIX. r. 3.

Where a receiver makes default in payment of a balance due from him payment may be enforced by committal. Whether an attachment may be had, *quære.*

2 R. & M. 55
14 L.J. 64 N.

IN this suit, by the Chief Clerk's certificate, a balance of £1138 was certified to be due from one *Godfrey*, the receiver in the cause, and he was ordered to pay the amount into Court to the credit of the cause on or before the 27th of August, 1869. He had not passed his final account, several small sums not having been yet

(1) 1 Jac. & W. 197.

got in. The receiver not having paid the sum due from him, on the 17th of December the Defendant obtained an order against him for immediate payment. The receiver, having disobeyed this order, the Defendant applied for an attachment against the defaulting receiver; but the Clerk of Records and Writs declined to issue an attachment, on the ground that since the Consolidated Orders the practice was to commit, and that an application to the Court was therefore necessary.

Mr. *Williamson*, on behalf of the Defendant, now moved to commit the receiver.

Mr. *W. W. Cooper*, for the receiver, opposed the motion, first, on the ground that the Defendant was always ready to pay the amount due from him, but claimed to be allowed the sum of £28 due to him. Secondly, he submitted that this motion was irregular, as the proper course against an officer of the Court was by attachment under Cons. Ord. XXIX.: *Daniell's* Chancery Practice (1).

The VICE-CHANCELLOR directed inquiry to be made as to the practice at the Office of Records and Writs.

Jan. 21. The Clerk of Records and Writs having made his certificate, the Vice-Chancellor made an order for committal.

The certificate was in the following terms:—

Record and Writ Clerks' Office, Chancery Lane.
January 20, 1870.

The ancient practice to enforce orders against receivers was by committal after service of a four-day order, but I consider that this mode of procedure was because no attachment could issue against a person *not* a *party* to a cause.

This general practice was varied by rule 3 of Ord. XXIX. p. 89, of the Consolidated Orders, whereby the word "person" was substituted for the word "party," and therefore as a receiver is a "person" we consider that he would be liable to an attachment for disobedience of an order. We do not think, however, that there has been any case of the issue of an attachment against a receiver since the alteration of the former practice.

The Master of the Rolls decided that a *fieri facias* could not be issued against

(1) Page 1591, n. (*x*).

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a receiver without the special order of the Court, and therefore, of course, an attachment could not issue as of course.

It is now for the Court to consider whether the case of a receiver comes within any of the exceptions in sect. 4 of the Act of 32 & 33 Vict. c. 62.

The Master of the Rolls has decided that an *attachment* should issue against a solicitor making default in payment of money reported due to his client, considering that he came within exception 4 of sect. 4.[1]

An attachment is the simplest and least expensive process.

James A. Murray.

Solicitors for the Defendant: Messrs. *Williamson, Hill, & Co.*
Solicitor for the Receiver: Messrs. *Scott & Co.*

[1] See ante Re Rush p. 147.

HEMMING *v.* MADDICK.

V.-C. M.
1870
Jan. 20.

Practice—Amendment of Bill—Materiality of Amendment—Cons. Ord. IX. r. 15 *—Maintenance—Liquidator prosecuting Contributory's Suit for Indemnity.*

In giving or refusing leave to amend a bill under Cons. Ord. IX. r. 15, the Court will not act upon the opinion of counsel, but will form its own judgment as to the materiality of the proposed amendment.

Semble, the liquidator of a company will not be allowed to prosecute a suit instituted by a contributory alleging himself to be a trustee of his shares for the Defendant, and claiming indemnity from him.

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THIS was a motion for leave to amend the bill after the time for amending without special leave had expired.

The Plaintiff, who was the registered holder of 250 shares in *Frederick Symons and Company, Limited*, a joint stock company now being wound up, subject to the supervision of the Court, under the *Companies Act*, 1862, and had been made a contributory in respect of these shares, by his bill alleged that he took the shares under an arrangement with the Defendant that he should hold them for and on behalf of the Defendant, or deal with them as the Defendant should direct, and that the Defendant should indemnify him against all loss or liability which he might incur as the holder of the shares, and prayed that the Defendant might be ordered to reimburse to him all sums of money which he had paid for calls, and all costs, &c., incurred by him as the holder of the shares, and to indemnify him against all liability in consequence of his being made a contributory.

The bill was filed in December, 1868, and the answer on the 10th of March, 1869.

On the 30th of July, 1869, an agreement was made between the Plaintiff and the liquidator of the company that the Plaintiff should pay a sum of money on account of his liability on the shares, and authorize the liquidator to prosecute this suit in his name, and to retain any moneys which might be recovered by means of the suit in satisfaction of the Plaintiff's liability as a contributory in respect of the 250 shares, and the liquidator agreed immediately after the termination of the suit to take steps to obtain the

SC on appeal 2 Ch.D. 393

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sanction of the Court to the Plaintiff being discharged from all calls and liabilities in respect of the shares.

On the 7th of August, 1869, an order was made by the Master of the Rolls in the matter of the winding-up, that the liquidator should be at liberty to prosecute the suit at the expense of the company, and on the 10th of August the liquidator's solicitors were appointed solicitors of the Plaintiff.

On the 26th of August the Plaintiff's solicitors took out a summons for leave to amend the bill, supported by an affidavit that the proposed amendment had been advised by counsel and was material; but the application was refused by the Chief Clerk, and afterwards by the Vice-Chancellor *Malins* in Chambers, who at the same time gave leave to renew the application by way of motion.

The proposed amendments consisted not in stating new facts, but in setting up more distinctly the case that the Plaintiff was a trustee of the shares for the Defendant.

Mr. *Cotton*, Q.C., and Mr. *Chitty*, for the Plaintiff, in support of the motion:—

It is said that this application must be refused on the ground that the suit is being prosecuted by the liquidator in the name of the Plaintiff, and that it is sought to make the Defendant a contributory instead of the Plaintiff; but that objection was overruled in *In re National Financial Company* (1), where *Maitland*, who was a contributory of the *Tyne Company* in respect of shares held by him as a trustee for the *National Financial Company*, was admitted as a creditor of the *National Company* for the amount of past and future calls on the shares, and an arrangement that the liquidator of the *National Company* should be at liberty to pay over to the liquidator of the *Tyne Company* the dividends payable to *Maitland* in respect of the calls, and that the *Tyne Company* should accept such payments in discharge of *Maitland's* liability in respect of the shares, was sanctioned by the Court. The trustee of shares is entitled to be indemnified by the *cestui que trust*, not only against what the trustee actually pays, but against his whole liability in respect of the shares: *Cruse* v. *Paine* (2); and it can make no difference to the Defendant that by an arrangement

(1) Law Rep. 3 Ch. 791. (2) Law Rep. 6 Eq. 641.

between the Plaintiff and the liquidator the company is to get the benefit of the indemnity. Moreover, the prosecution of this suit by the liquidator has been sanctioned by the Master of the Rolls.

[The VICE CHANCELLOR:—What is the materiality of the proposed amendment?]

The liquidator has been advised by counsel that it is desirable to amend the bill, so as to present the Plaintiff's case to the Court in the clearest manner, and it is the practice of the Court in such cases to be satisfied with the opinion of counsel, and not to call upon the Plaintiff's counsel on such a motion to shew the insufficiency of the original bill.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the Defendant, were not called upon.

SIR R. MALINS, V.C.:—

This is an application for leave to amend a bill several months after the time allowed by the orders of the Court for amending without special leave has expired. It is an application to the discretion of the Court, and I am always disposed to exercise that discretion liberally, in order that suits may be brought to a hearing in such a shape as to present the case before the Court as completely as possible. The case made by this bill is, that the Plaintiff took shares in a limited company as trustee for the Defendant, and the object of the proposed amendment is to raise that case more distinctly; but I am of opinion that the original bill distinctly raises the case that the Plaintiff is a mere trustee for the Defendant, and I do not think that the amendment could make the case at all clearer than the original bill. The Court, before giving special leave to amend a bill, must be satisfied of the materiality of the proposed amendment; but I am of opinion that in this case the proposed amendment is not material, and therefore on that ground I must refuse to give leave to amend.

But there is another point to be considered in this case. No doubt this Plaintiff, if he is a trustee, having been made a contributory, is entitled to go against his *cestui que trust* for indemnity

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to the full extent of his liability in respect of the shares; and if he were personally prosecuting this suit, I should be disposed to give him every possible indulgence; but it is admitted that he is not prosecuting the suit, and that the person on whose behalf this application is made is the liquidator of the company. It is, I believe, the first time that such a case has occurred. Now, the liquidator is, in my opinion, bound to take the person whose name he finds on the register for better or for worse. It may happen that the shareholder on the register, who is a trustee for another person, is a solvent man, and that the *cestui que trust* is insolvent, or it may be just the other way. The company must take its chance of that, and can only look to the person on the register. But this liquidator is seeking, by using the name of the Plaintiff, to make the Defendant, who is the *cestui que trust*, the contributory. I do not think that this ought to be done, the company having no right to go against the *cestui que trust*, who is not on the register. Therefore upon both grounds, but principally on the ground that the proposed amendment is immaterial, I must refuse this motion with costs.

Solicitors for the Plaintiff: Messrs. *Linklaters, Hackwood, & Addison.*

Solicitor for the Defendant: Mr. *Alfred Cox.*

V.-C. M. 1870 Jan. 21.

In re WILLIAM SMITH'S ESTATE.

Lands Clauses Act (8 *Vict. c.* 18), *s.* 70—*Purchase-money—Interim Investment on Real Security.*

The Court will sanction the interim investment on real security of purchase-money paid into Court under the *Lands Clauses Act.*

THIS was a Petition for the interim investment, on a mortgage of a freehold estate, of £1400, part of £1619, the purchase-money of part of a settled estate taken by the District Local Board of *Brighton* under the compulsory powers of the Local Government Acts, which had been paid into Court by the Local Board under the *Lands Clauses Act.*

Mr. *Angelo Lewis*, for the Petitioners, the trustees of, and parties entitled to, the settled estate.

Mr. *Bovill*, for the Local Board:—

It is contrary to the practice of the Court to sanction an interim investment on mortgage: *Ex parte Franklyn* (1). Under sect. 70 of the *Lands Clauses Act* the interim investment is to be made by the Accountant-General. It is a great hardship to the Local Board to be made to pay the costs of an investment on mortgage, and afterwards to pay the costs of a permanent investment in the purchase of land. If the proposed investment is made, it must be treated as a permanent investment, as in *In re Lomax* (2).

Sir R. Malins, V.C.:—

The 70th section distinctly provides for temporary investment in real securities, and such an investment is perfectly proper if the security is such as the Court approves. There must be an inquiry as to the sufficiency of the security, and if it is found sufficient the order must be made. The Local Board must pay the costs according to the Act, and it will be time enough to consider the question of the costs of a permanent investment when an application is made for that purpose.

Solicitor for the Petitioners: Mr. *W. Clarke.*

Solicitors for the Local Board: Messrs. *Tilleard, Son, Godden, & Holme.*

In re HALL'S ESTATE.

Lands Clauses Act (8 *Vict. c.* 18)—*Purchase-money in Court—Dower—Payment out of Part of Fund to Dowress.*

Where land belonging to an infant, subject to his mother's right of dower, was taken by a railway company, and the purchase-money, as determined by two valuers, was paid into Court under the *Lands Clauses Act*:—

Held, that the dowress was entitled to have the value of her right of dower, as determined by the valuers, paid to her out of the fund in Court.

In January, 1869, the *Metropolitan Railway Company* took under the powers of their Acts a freehold house, of which *Humphrey*

(1) 1 De G. & Sm. 528. (2) 34 Beav. 294.

V.-C. M. 1870 — *In re* HALL'S ESTATE

James Hall, an infant ward of the Court, was seised in fee, subject to the right of dower of his mother, *Agnes Elizabeth Hall*. A valuer appointed by the Court on behalf of the infant to agree with the company as to the amount to be paid for the house, and the valuer appointed by the company, having agreed that the value of the house was £500, out of which £102 1*s.* 8*d.* was agreed by them to be the value of the dower of *Agnes E. Hall*, a contract for the sale of the house free from dower to the company for £500 was sanctioned by the Court, and the company paid the £500 into Court under the *Lands Clauses Act*.

A Petition was now presented by *Agnes E. Hall* and by the infant for the payment of £102 1*s.* 8*d.* out of the fund in Court to *Agnes E. Hall*, and for the investment of the residue of the fund in consols, and for the application of the dividends for the maintenance of the infant.

Mr. *Chitty*, for the Petitioners.

Mr. *Bovill*, for the Company, submitted that the proper course would be to invest the whole fund, and pay one-third of the dividends to the dowress for life.

SIR R. MALINS, V.C., held that the dowress was entitled to be paid the value of her right of dower out of the *corpus* of the fund.

Solicitor for the Petitioners: Mr. *Wellborne*.
Solicitors for the Company: Messrs. *Burchells*.

JOHNSTON *v.* RENTON.
JOHNSTON *v.* PARSEY.

V.-C. J.
1870
Jan. 12, 13.

Railway Company—Deposit of Stock Certificates for safe Custody—Fraudulent sale by Depositee—Forged Transfer—Registration of Shares—Rights of Owner.

Plaintiff, the owner of railway shares in two companies, took certificates from the companies, for which he gave receipts. In so doing he gave his address, in one instance, at the office of a banking company, in the other, at a club. He deposited the certificates with the manager of the bank for safe custody. The manager fraudulently sold the shares, and forged the name of the Plaintiff to transfer deeds of the shares. The companies wrote to the Plaintiff informing him of the transfers; and receiving in one instance no answer, and in the other an answer purporting to come from the Plaintiff, but in reality forged by the manager, registered the shares.

On bill against one of the companies and the purchaser, praying that the purchaser might be decreed to deliver up the certificate to the Plaintiff, that the company might be decreed to cancel the alleged transfer, and the entry of it in their books, to deliver to the Plaintiff a stock certificate, and to pay the dividend then due, and all future dividends:—

Held, that the Plaintiff was entitled to the relief prayed, but without prejudice to any question at law or in equity between the co-Defendants:

Held, further, that the negligence or mistaken confidence of the Plaintiff disentitled him to costs against either Defendant.

THE Plaintiff in these suits, *William Johnston*, of *Ann Street, Stonehaven*, in the county of *Kincardine*, in 1865 delivered the certificates for twenty-five fully paid up £20 shares in the capital of the Defendants in the first suit, the *Metropolitan District Railway Company*, for safe custody to *George Edward Hudson*, then general manager of the *United Service Company, Limited*, carrying on business at 9, *Waterloo Place, Middlesex*, with whom the Plaintiff kept a banking account; and on the 4th of September, 1865, *Hudson* signed and handed to the Plaintiff a receipt for the same, as such general manager.

On the 25th of September, 1865, the shares were converted into stock, and the Plaintiff's name was entered in the books of the railway company as the holder of that amount. The stock certificate was handed to the Plaintiff, who signed a receipt for the same, and at the time of so doing gave his address at 9, *Waterloo*

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Place, and informed the company's assistant registrar that such address was quite correct, as it was the address of his agent, *George Edward Hudson,* who had had the custody of the share certificates, and had also had the receipt of the company in exchange for them, which receipt he (*Hudson*) had lost.

On the 12th of November, 1867, the Plaintiff delivered the stock certificate to *Hudson* for safe custody. The dividends on this sum of stock were received by *Hudson,* and were credited to the Plaintiff in his banking account.

On the 19th of June, 1868, the *United Service Company* passed a general resolution for winding up voluntarily; and on the 6th of July following the resolution was confirmed.

In the meantime *Hudson,* who had begun to carry on business as a banker on his own account, sold the £500 stock, without the sanction or knowledge of the Plaintiff, to the Defendant in the first suit, *James Renton,* who bought the same in the ordinary course of business on the *Stock Exchange,* of which he was a member. The transfer deed was forwarded through *Hudson's* broker in due course to *Hudson,* who forged the name of the Plaintiff to the deed, which bore date the 30th of June, 1868, and purported to transfer the £500 stock to *Renton.* On the 3rd of July the forged transfer deed and the Plaintiff's stock certificate were forwarded to the railway company, whose registrar, on the 7th of July, addressed a letter to the Plaintiff at 9, *Waterloo Place,* informing him that the transfer had been lodged at the office for registration. No answer was received to this notice; the deed was registered in the usual way; and the railway company delivered to *Renton* a new stock certificate which included this £500 stock.

Shortly before the 4th of November, 1868, *Hudson* absconded, and on or about that day the Plaintiff discovered the fact of the forgery. On the 6th of November his solicitors wrote to the secretary of the railway company, informing him that the transfer was a forgery, and that they were instructed to take steps to have it cancelled. They also wrote a similar letter to *Renton.*

In a subsequent letter to the secretary of the company Plaintiff's solicitors said they were prepared to do all they could to satisfy the company that the Plaintiff's name had been forged, and that

under the circumstances the company could not legally hold the stock; and that if the company put the Plaintiff to the expense of proceeding, he should be compelled to ask for costs against them.

The Defendant *Renton* wrote to say he did not hold himself liable to the Plaintiff to return the stock.

The bill was filed on the 20th of November, 1868, and amended on the 14th of April, 1869; and as amended prayed, 1, that the Defendant *Renton* might be decreed to deliver to the Plaintiff the certificate for the £500 stock; and, 2, that the Defendants the company might be decreed to cancel the alleged transfer, and the entry of it in their books, and to enter the name of the Plaintiff in their books as the owner of such £500 stock, and to deliver to the Plaintiff a certificate of the ownership of such stock, and to pay the dividends accrued and to accrue on such stock since the date of the alleged transfer.

The Defendant *Renton*, by his answer, denied the fact of the forgery, and said he believed the Plaintiff authorized Mr. *Constable*, a broker, from whom he, *Renton*, obtained the stock, to receive the dividend, and pay it to him, *Renton*. He maintained that his legal title to the stock had been perfected and admitted as between himself and the company. He submitted that although the Plaintiff might, if the allegations in the bill were true, be entitled to some relief against the company, he was not entitled to relief against him; and that he had been improperly made a party. He further submitted that the Plaintiff had by his own acts and defaults so contributed to the perpetration of the fraud alleged in the bill that he was debarred from obtaining the relief, if any, to which, but for such acts and defaults, he might be entitled.

The facts in the second suit of *Johnston* v. *Parsey* were substantially similar.

On the 4th of September, 1865, the Plaintiff *Johnston* deposited with the *United Service Company* a debenture bond of the *Ceylon Company, Limited*, for £600. He afterwards sold the debenture, and with the proceeds purchased £200 stock of the *London and South-Western Railway Company*. On the 10th of June, 1868, the Plaintiff wrote to the treasurer of the railway company, stating that his

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certificates were "now in the possession of my agents, the *United Service Company*," to whom the writer begged that all dividends thereon might be made payable. In a postscript he said that his address was the *East India United Service Club, St. James's Square.* On the 11th of June he deposited the certificates with the *United Service Company.* In the latter part of the month of June, *Hudson*, without the Plaintiff's consent, sold this sum of stock to the Defendant, *William Parsey*, and delivered the certificate to him or his brokers. At the same time he forged the Plaintiff's name to the transfer deed. The forged transfer was forwarded to the company in the usual way, and the treasurer, on the 7th of July, wrote to the Plaintiff at the club, informing him that a deed of transfer had been sent to the office for registration, and asking, if the transfer should be correct, that the Plaintiff would affix his signature to that notice, and return it. No answer was received to this; and the treasurer wrote two other letters to the same address. At length the treasurer received the following reply:—

"14, *St. James's Square*, 16th July, 1868.

"Sir,—In reply to yours of the 11th and 15th instant, I beg to say that I have executed a deed of transfer of the £200 stock held by me in the *London and South-Western Railway.*

"I am, Sir,

"Your obedient Servant, *W. Johnston.*

"To the Treasurer of the *London and South-Western Railway.*"

The signature to this letter was also a forgery by *Hudson*, who, by some fraudulent means, had got possession or knowledge of the contents of the letters. The company registered the transfer; and received no further communication until the 10th of November, 1868, when the Plaintiff's solicitors wrote to the treasurer a letter, informing him of the forgery. This was within four days of the Plaintiff becoming aware of the fact. In reply, the treasurer wrote to say the shares had been transferred into the name of the Defendant, Mr. *William Parsey.* Plaintiff's solicitors wrote again to say, that they were instructed to take the requisite proceedings to have the transfer cancelled; and that if the railway company would not consent to restore the stock they should be driven to take proceedings of which they should seek to make the Defendants

bear the costs. This bill was filed on the 5th of January, 1869, against Mr. *Parsey* and the company, and amended on the 14th of April, praying that the Defendant *Parsey* might be decreed to deliver up the certificate for the £200 stock, and to pay to the Plaintiff the amount of the dividend or dividends which he might have received in respect of the said stock; and praying against the company relief in the same terms as in the former suit (except as to payment of the dividends).

The answers of *Parsey* and of the railway company were substantially to the same effect as the answers in the first suit.

Mr. *Willcock*, Q.C., and Mr. *Graham Hastings*, for the Plaintiff:—

The cases on which we rely are *Tayler* v. *Great Indian Peninsula Railway Company* (1); *Governor and Company of Bank of Ireland* v. *Trustees of Evans' Charity* (2); *Cottam* v. *Eastern Counties Railway Company* (3); and *Hare* v. *London and North-Western Railway Company* (4). *Hildyard* v. *South Sea Company* (5) is an authority in our favour, both as to the frame of the suit, and the relief prayed.

Mr. *Fry*, Q.C., for the company, observed that no relief was prayed against the company, their acts were ministerial only, and they were willing to alter their books and pay over the dividend as the Court should direct. No application had been made to them.

Mr. *Willcock*:—In *Ashby* v. *Blackwell* (6) it was held that the company and not the innocent transferee should bear the loss. *Hare* v. *North Western Railway Company* (7) shews what the company should have done.

Renton's answer is most hostile, and the statement about his belief a most unnecessary and improper one.

The imputation of negligence on the Plaintiff's part wholly fails. He was justified in leaving his deeds with a banker, and in giving his address, in one instance at the bank, in the other at his club.

(1) 4 De G. & J. 559. 5 Jan 8 1867
(2) 5 H. L. C. 389, 413.
(3) 1 J. & H. 243. 6 Jan 8 1867
(4) Joh. 722.
(5) 2 P. Wms. 77.
(6) 1 Amb. 503; 2 Eden, 299.
(7) Joh. 726.

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Mr. *Lindley*, and Mr. *Stirling*, for the Defendant *Renton* :—

This is a wholly new case.

Why should the Plaintiff file a bill? He has a title to the stock, which has never been displaced. Property in stock is not transferred from the owner by being placed, under a forged power of attorney, to the name of another in the bank books: *Davis* v. *Bank of England* (1).

The Plaintiff should have sued at law for the value.

Mr. *Willcock* :—But I want the actual stock.

Mr. *Lindley* :—There is nothing to identify the stock now in the name of *Renton* with that formerly in the name of the Plaintiff. Stock differs from shares, inasmuch as shares are all numbered, and each is a specific thing. Stock is not: *Companies Clauses Act*, ss. 6, 62. The Plaintiff's remedy is an action upon the case for breach of duty; as in *Davis* v. *Bank of England.*

The VICE-CHANCELLOR :—That was an action for dividends.

Mr. *Lindley* :—*Hildyard* v. *South Sea Company* (2) was overruled by *Ashby* v. *Blackwell* (3), and has never been followed.

The VICE-CHANCELLOR asked if there was any case in which it had been held that this Court had no jurisdiction.

Mr. *Lindley* :—No; but here it was the company's duty to act only upon a proper authority. If a man innocently takes a forged cheque to a bank, and gets it cashed, it is the banker's loss; the banker cannot recover.

The Plaintiff might have had a mandamus.

The VICE-CHANCELLOR :—But has a Court of Common Law any power to compel the company to alter its register?

Mr. *Lindley* :—The bill is sustainable only on the theory that the purchaser held the certificate. But in point of fact the certificate was not in our custody.

This Court will not go into the question as between the purchaser and the company, though that was done in *Ashby* v. *Blackwell.* This appears from the decree in *Cottam* v. *Eastern Counties Railway*

(1) 2 Bing. 393. (2) 2 P. Wms. 77. (3) 1 Amb. 503; 2 Eden, 299.

Company (1). If the Court should be against me on the first point I shall be content with a decree as in that case, which was without prejudice.

The VICE-CHANCELLOR:—I certainly will not be the first Judge to say a man is not to come into this Court for relief in a case of this kind.

Mr. *Lindley*:—Then as to the costs; it was owing to the Plaintiff's negligence in depositing his title deed with a bank, and giving the name of the bank as the place where notices were to be served, that the company did not detect the fraud.

Mr. *Fry*, Q.C., and Mr. *Streeten*, for the company:—

After what has fallen from the Court, the decree we ask for is, that the certificate should be re-delivered to the Plaintiff.

The VICE-CHANCELLOR:—What jurisdiction have I to make a decree between co-Defendants?

Mr. *Fry*:—The Court can order the certificate to be delivered up to be cancelled.

As to the costs; the question of negligence is disposed of by the remarks in *Cottam* v. *Eastern Counties Railway Company*. It was *Renton* who presented the forged transfer to us, and he ought to pay the costs. We made an inquiry but got no answer.

In the second suit—

Mr. *Willcock*, Q.C., and Mr. *Graham Hastings*, for the Plaintiff.

Mr. *Amphlett*, Q.C., and Mr. *Lindley*, for the Defendant *Parsey*:—

In *Taylor* v. *Midland Railway Company* (2), where stock had been standing in the names of two trustees, and one executed a transfer and forged the name of the other to the deed, and the company registered the transfer, and were called upon to replace the stock, Sir *H. Cairns* raised the objection that the company were not bound to notice trusts, and, apart from any legal liability they might be under, could not be called upon to replace the stock. But the objection was overruled. This decision was affirmed: *Midland Railway Company* v. *Taylor* (3).

(1) 1 J. & H. 243. (2) 28 Beav. 287. (3) 8 H. L. C. 751.

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In *Sloman* v. *Bank of England* (1) the bank was held compellable in equity to re-invest stock in the name of the co-trustee against whom the fraud had been committed.

We are unnecessary parties; the mistake arose from the negligence of the company.

At all events the Plaintiff can get no costs against *Parsey*.

Mr. *Fry*, Q.C., and Mr. *Gaselee*, for the company:—

In this case we took even greater precautions than in the former. We wrote three letters, and got a reply to one of them.

In this instance, dividends have been paid to *Parsey*. Upon that point we refer to *Hildyard* v. *South Sea Company* (2).

Mr. *Willcock*, in reply, on the question of costs only.

SIR W. M. JAMES, V.C.:—

Both these cases appear to me to be on all fours with *Cottam* v. *Eastern Counties Railway Company* (3), both as to the relief prayed, and as to the costs.

In this case, no doubt, the Plaintiff had a right to say, "I am the owner of stock, and the company will not acknowledge my right." I am of opinion that it would have been quite competent to the Plaintiff, if he had been so advised, to have filed a bill against the company alone, saying, "I am the owner of this stock, I am a shareholder. You have put somebody else's name on the register. That is a matter I have nothing to do with, any more than if you had given it to anybody without authority. I claim that I had £500 stock, and I still have it; it never having been transferred." He might have filed his bill against the company for that purpose; and if he had done that, the company might probably have insisted that somebody else should have been made a party, and if the company had so insisted, then there would have been a different question as to the costs. No such opportunity was given to the company here. The company, if such opportunity had been given, would probably have given notice to the transferees, that if they did not come in as Defendants they, the company, would re-transfer the fund back into the name of the transferor, or something of that kind.

(1) 14 Sim. 475. (2) 2 P. Wms. 77. (3) 1 J. & H. 243.

However that may be, the facts here are substantially the same as in the case of *Cottam* v. *Eastern Counties Railway Company* (1); that is to say, a forged instrument, together with the possession of title deeds, was presented to the company; the company acted upon that; the person who claimed under the forged instrument was made a Defendant; the company was also made a Defendant; and the decree in that case was to restore the debentures to the Plaintiff whose name had been forged. But at the same time the conclusion of the Vice-Chancellor's judgment was, that it was not a case for costs.

I am bound to say I cannot see any distinction between that case and this, at all events, any distinction which is in favour of this Plaintiff; because, as far as I can make out, there was no negligence of any kind attributable to the parties there, except that they all three joined in depositing the instrument in the hands of one solicitor.

In this case I am bound to say there is some evidence of negligence, or, at least, of misplaced confidence, on the part of the Plaintiff, which misplaced confidence has led to the loss; and it would, therefore, be very hard, as it seems to me, to throw the costs arising from the Plaintiff's misplaced confidence on the other parties who have been misled by it. The facts are these:—In the first place, as to one company, he gave his address at the bankers, who, through their manager, allowed the certificates to get out of their hands. He trusted the certificates with them; that is part of the trust which he reposed in the bank. He then told the company that any notice to be sent to him connected with these shares was to be sent to the bank. The notices were sent to the bank, and thereby the company was deprived of the protection which they otherwise would have had. Then he says, "It was all wrong, it was a gross fraud of the manager of the bank." But who was it who trusted the bank? and who was it who, through the bank, trusted the manager? Why, the Plaintiff. It seems to me, therefore, that, in the first place, the Plaintiff has by his own negligence led to the proceedings.

In the second suit, he says he gave his address at his club. In some way or other the club must have received authority from

(1) 1 J. & H. 243.

V.-C. J. 1870 JOHNSTON v. RENTON. JOHNSTON v. PARSEY.

him, or must have considered they had authority from him, to hand the letters over to the person who got them, and it was the Plaintiff's business to have taken care that letters of business were sent to him at his own proper address. Not having done that, he also in that respect has contributed by his own want of precaution, or his own misplaced confidence in somebody else, which comes to the same thing, to the loss.

Therefore it seems to me that I have a stronger case here than in *Cottam* v. *Eastern Counties Railway Company* (1), for following the decision of the Vice-Chancellor, and saying that this is not a case for costs against either of the Defendants.

The remedy will be simply, in the first suit, to decree the company to cancel the alleged transfer of the £500 stock to the Defendant *Renton*, and the entry of such alleged transfer, and to enter the name of the Plaintiff in their books as the owner of such £500 stock, and to deliver to the Plaintiff a certificate of the ownership of such stock; it will be exactly as it stands in the second paragraph of the prayer of the amended bill. I think the company must pay the dividend. I think the Plaintiff has a right to have it, whether against the person who has received it, or against the company. In the first suit, therefore, the order for payment of the dividend will be against the company.

In the second suit, I think the Plaintiff has a right to say, "You have paid away my money, and you must repay it to me." It will exactly follow the words in *Cottam* v. *Eastern Counties Railway Company*.

Mr. *Fry* asked that the decree might be without prejudice to any question between the co-Defendants in equity as well as at law.

The VICE-CHANCELLOR assented to this.

Solicitors for the Plaintiff: Messrs. *Deane & Chubb*.

Solicitors for the Defendants in the first suit: Messrs. *Murray & Hutchins*; Messrs. *Baxter, Rose, Norton, & Co.*

Solicitors for the Defendants in the second suit: Messrs. *R. & W. B. Smith*, agents for Mr. *John Pearce, Wandsworth*; Mr. *L. Crombie*.

(1) 1 J. & H. 243.

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SAME *v.* SAME.

V.-C. J.
1870
Jan. 21.

Settlement—Construction—Voluntary Covenant to forego a General Power of Appointment by Will—Release to Trustees—Validity of Release in Equity.

By a post-nuptial settlement a settlor, in 1837, granted lands to trustees upon trust, after the death of the survivor of the settlor and his wife, to such persons and for such uses as the settlor should by will appoint, and in default of appointment for all the children of the settlor. The deed contained an ultimate limitation, if there should not be any child of the existing marriage, for the settlor absolutely. In 1841 the wife died, leaving four children of the marriage. By a re-settlement in 1848, to which the same trustees were parties, after reciting that it had been proposed that the settlor should give up his life estate in the premises, and forego the power given to him of appointing by will, the settlor granted the rents and profits during his life to the trustees upon trusts for the benefit of his four children. He also covenanted with the trustees that he would not make any will whereby the trusts thereby declared should be impeached or defeated, and released the trustees from all the trusts of the former settlement. Shortly afterwards he married again, and had seven children by his second marriage. He died in 1866, having by will devised and bequeathed all his real and personal estate upon trust for his wife for life, and after her death upon trust to sell, and divide the proceeds among the children of the second marriage:—

Held, that the ultimate limitation in the deed of 1837 did not cut down the meaning of the word "children" of the settlor to children of the first marriage; and that the children of both marriages were entitled to the benefit of the deed of 1837:

Held, further, that the covenant and release in the deed of 1848, though voluntary, operated in equity as an effectual release of the power of appointment by will in the settlement of 1837:

Held, further, that the power was wholly released, and that the release of the power was not confined to the shares of the children of the first marriage, who alone were living at the date of the deed of 1848.

ON the 24th of February, 1835, *Charles Hughes* married *Mary Anne Wheeler.*

By a settlement, dated the 20th of May, 1837, and made between *Charles Hughes* and *Mary Anne* his wife of the one part, and *John Whitmore Isaac* and *George James Alexander Walker* of the other part, after a recital that *Charles Hughes*, having received the sum of £400, which belonged to his wife, since her marriage, was desirous of settling the property therein described for the

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benefit of himself, his wife, and children, certain property belonging to *Charles Hughes*, consisting of freehold hereditaments, a share in the *Birmingham Fire Office*, a sum of £2600 11*s.* 9*d.*, part of a larger sum in the hands of *Thomas Hughes* and another, executors of the will of *Charles Lingham*, deceased, and a moiety of the residuary estate of *Charles Lingham*, was granted and assigned to and to the use of *Isaac* and *Walker*, their heirs, executors, administrators, and assigns; and it was declared that they, their heirs, executors, administrators, and assigns, should stand seised and possessed of the same for such persons and uses as *Charles Hughes* and *Mary Anne* his wife should jointly appoint; and in default of such appointment upon trusts for the benefit of *Mary Anne* and *Charles Hughes* successively for life; and after the death of the survivor "upon trust for such person or persons . . . and for and upon such uses and trusts, and either with or without power of revocation and new appointment, and with such other powers, provisoes, conditions, limitations, or agreements, and in such manner and form as the said *Charles Hughes*, by his last will and testament in writing, or any codicil thereto . . . attested by three or more credible witnesses, shall direct, limit, and appoint; and in default of and until any such direction, limitation, or appointment," upon trust, with all convenient speed, to sell, and stand possessed of the proceeds "upon trust for all and every the child and children of the said *Charles Hughes*, if more than one, in equal shares," the share of each child to be paid or transferred at twenty-one or marriage, unless such age or day should arrive in the lifetime of *Charles* and *Mary Anne Hughes*, or the survivor, in which case the same was to be paid or transferred as soon as might be after the decease of the survivor; and, notwithstanding the postponing the payment or transfer of any such share or shares, each child's share should be deemed vested in each such child who should attain twenty-one or be married.

The deed contained the usual clauses of survivorship and accumulation for the benefit of the children, and powers for making advancement; and then proceeded:—

"But if there shall not be any child begotten by the said *Charles Hughes* on the said *Mary Anne* his wife, or, being such, if no such child live to attain a vested interest in the said trust

moneys and premises, then and in such case the said *John Whitmore Isaac* and *George James Alexander Walker*, and the survivor of them, his executors and administrators, shall stand possessed of the said trust estate, moneys and premises, or so much thereof as shall not have been applied for the advancement of any such child or children respectively, in trust for the said *Charles Hughes*, his executors, administrators, and assigns."

By another deed of even date, but executed subsequently to the former, *Charles Hughes* and *Mary Anne* his wife executed their power of appointment by mortgaging the property to *Thomas Hughes* to secure £3000 and interest.

Mary Anne Hughes died in the year 1841, leaving issue of the marriage four children, *Frances Harriet*, *Sarah Ann*, *Henry Thomas*, and *Charles Hughes* the younger.

By a deed of re-conveyance and re-settlement, dated the 25th of November, 1848, and made between *Thomas Hughes* of the first part, *Charles Hughes* the elder of the second part, and *J. W. Isaac* and *G. J. A. Walker* of the third part, after reciting the settlement of the 20th of May, 1837, and the mortgage, and that the sum of £3000 so secured had been repaid to *Thomas Hughes* out of the proceeds of the sale of the share in the *Birmingham Fire Office*, and other the share to which *Charles Hughes* the elder was entitled in the residuary estate of *Charles Lingham*, and the private moneys of *Charles Hughes* the elder; and that the trust houses and premises then consisted of a messuage in *Bridge Street* and five messuages in a street called *The Shambles*, in the city of *Worcester*; and that the rents and annual produce of the premises had been duly accounted for up to the date of the present indenture; that a policy for £1000 on the life of *Charles Hughes* the elder had been assured to his executors, administrators, and assigns; and that there were four children (naming them) of *Charles Hughes* and *Mary Anne* his late wife; it was recited as follows:—

"And whereas it has been proposed and agreed that the said *Charles Hughes* shall (*sic*) give up his life estate and interest in the said trust estates and premises, and should (*sic*) forego the power given to him of disposing of the same by will, and that the same, as also the said sum of £1000 secured on his life as aforesaid,

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should be re-settled upon such and the like trusts and powers for the benefit of his said above-named children as declared in and by the said first hereinbefore recited indenture, and that such release should be given as hereinafter mentioned."

The deed then witnessed, that in consideration of the sum of £3000 so repaid to *Thomas Hughes*, he, *Thomas Hughes*, granted and assured the hereditaments described in the first recited indenture to and to the use of *J. W. Isaac* and *G. J. A. Walker*, their heirs and assigns, upon the trusts in the present deed declared; and that in pursuance of the agreement, and in consideration of the premises, and of the natural love and affection which *Charles Hughes* had "towards his said children, and for other the valuable considerations him thereunto moving," *Charles Hughes* thereby granted and assigned "all those the rents and profits arising or to arise out of" the before described messuages and hereditaments, and to which he, *Charles Hughes*, was, under the first recited indenture, entitled for life; and also assigned and transferred the policy of assurance for £1000 to *Isaac* and *Walker*, their respective heirs, executors, administrators, and assigns, upon and subject to the trusts and powers in the present indenture declared and mentioned: It was thereby agreed and declared that the trustees should stand possessed of the rents and profits so assigned for the life of *Charles Hughes*, upon trust, first to pay the premiums on the policy, and sums reasonable for maintaining, repairing, and insuring the premises, and subject thereto, during the life of *Charles Hughes*, to invest the residue in their names from time to time as therein mentioned, with power to vary securities, and to accumulate the same by way of compound interest, with power to the trustees, at their absolute discretion, to realize all or so much of the trust funds as to them should seem advisable towards the maintenance or education or the advancement of "the said hereinbefore named" children of *Charles Hughes* the elder as to the trustees should seem proper. And it was thereby agreed that the trustees should stand seised and possessed of the said funds and accumulations, messuages and hereditaments, policy moneys, and premises, as follows:—

"Upon such and the same and the like trusts for the benefit of

the said children of the said *Charles Hughes* and *Mary Anne* his late wife, and subject to the same provisions for maintenance and advancement, and also subject to the same powers of leasing, of investing, re-investing, sale, and appointment of trustees, as in the said first hereinbefore recited indenture are set out and contained."

Charles Hughes the elder thereby, for himself, his heirs, executors, and administrators, also covenanted with *J. W. Isaac* and *G. J. A. Walker*, their heirs, executors, administrators, and assigns, that the policy was subsisting, and that he would not do or suffer anything whereby the policy might become void; and also as follows:—

"And that he, the said *Charles Hughes*, will not at any time hereafter make any will, or codicil, or disposition, whereby or by means whereof the trusts hereby declared of and concerning the said rents, messuages, or tenements, policy moneys, and premises can or may be in anywise impeached or defeated."

Charles Hughes the elder thereby also released *J. W. Isaac* and *G. J. A. Walker*, "and each of them, and each of their heirs, executors, and administrators, and their and his respective estates," from all actions and suits which *Charles Hughes* the elder then had up to the date of the present deed upon or against *J. W. Isaac* and *G. J. A. Walker*, "or either of them, or their or either of their heirs, executors, or administrators, by reason or on account of the trusts reposed in them by virtue of the first hereinbefore recited indenture, or by reason or on account of any matter or thing whatsoever in respect of the same indenture."

On the 28th of November, 1848, *Charles Hughes* the elder married *Anne Elizabeth Gore*.

On the 14th of December, 1866, *Charles Hughes* the elder died, leaving issue of his second marriage seven children, all infants.

By his will, dated the day preceding, he devised and bequeathed to his wife, *Anne Elizabeth Hughes*, subject to the payment of his debts and funeral and testamentary expenses, all his real and personal estate, whatsoever and wheresoever, during her life, and after her decease he directed the same to be sold, and the proceeds thereof to be equally divided between the seven children the issue of his marriage with *Anne Elizabeth Hughes*, or such of them as

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should be living at her decease, share and share alike, but in case any of his said children should be then dead leaving issue, then he directed that such issue should be entitled to his or her deceased parent's share. He appointed his wife (who alone proved) and another person, executrixes of his will.

Charles Hughes the younger attained twenty-one, and died in the year 1866, in *New Zealand*, intestate; and administration to his estate was granted to *Anne Elizabeth Hughes*, widow.

The only property now subject to the trusts of the above deeds of 1837 and 1848 was the house property in *Worcester*.

The bill in the first suit was filed on the 13th of February, 1868, by the trustees, *Isaac* and *Walker*, against the three surviving children of the first marriage, the widow, and the seven children of the second marriage, stating that questions had arisen how far the reconveyance of 1848 operated as a release of the power of appointment by will contained in the settlement of 1837; and if it operated as a release, whether it released the power as to the entirety of the premises, or as to the share and interest only of the children of the first marriage therein, it being apprehended that the trusts of the settlement of 1837 in favour of the children of *Charles Hughes* the elder were applicable to and included the children of both marriages; and prayed for a declaration of the rights of all parties in the messuages and hereditaments; and that the trusts of the deeds might be carried into execution under the direction of the Court.

On the 9th of November, 1868, the first cause came on for hearing before Lord Justice, then Vice-Chancellor, *Giffard*, when His Lordship said he thought the covenant was not a release of the power (1); and if not, that the trustees would be creditors in respect of the covenant; and further, that if the trustees were creditors, they could not assert their rights in a suit framed as this was. His Lordship also observed that this was only a voluntary deed, and that as the power of sale only arose in the event of the property being released, the trustees could not sell the property. His Lordship accordingly recommended that a short bill should be filed for the administration of the settlor's estate.

(1) It was stated on this occasion that no authority could be found on the question, the nearest case being *Collins* v. *Plummer* (1 P. Wms. 104).

Accordingly the bill in the second suit was filed on the 20th of November, 1868, by the trustees, *Isaac* and *Walker*, on behalf of themselves and all other the creditors of *Charles Hughes*, against *Anne Elizabeth Hughes*, the widow, charging, that as the will was an appointment under the power, the Plaintiffs became, by virtue of the covenant not to exercise the power, creditors of the testator to the extent of the interest of the children of the first marriage defeated by exercise of the power; and praying for an account of what was due to the Plaintiffs and all other the creditors of the testator, and that the amount so due might be raised and paid out of the testator's real and personal estate (including any estate appointed by his will) in a due course of administration.

The property was sold under a decree in both suits, and the causes now came on for further consideration.

Mr. *Charles Walker*, for the Plaintiffs in both suits:—

The questions are, whether the children of the second marriage can take in competition with the children of the first marriage under the trust in default of appointment in the deed of 1837; whether the power of appointment was effectually released by the deed of 1848; and if released, whether as to the whole fund, or only to the extent of the interest taken by the children of the first marriage.

On behalf of the creditors in the second suit, I submit that the power was not released; and that the will was a good appointment.

It is not disputed that a covenant not to exercise a power is a release entirely, or *pro tanto*, in equity, where such covenant is for value; but not, I submit, as here, where it occurs in a voluntary deed.

It is admitted that if the Plaintiffs' contention prevails, creditors for value will take in priority to the Plaintiffs, who are voluntary covenant creditors only.

Mr. *Kay*, Q.C., and Mr. *Vincent*, for the children of the first marriage:—

We alone were the beneficiaries under the first settlement; the children of the second marriage are excluded.

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The motive of the settlor is apparent, first, from the recital, secondly, from the terms of the ultimate limitation.

It is contended that the will was an exercise of the power; but the power had, in fact, been effectually released. The consequence is, that the property never became assets of the testator but remained vested in the children of the first marriage, in default of appointment.

The VICE-CHANCELLOR asked if the attention of his predecessor had been called to the circumstance that the covenant and release was entered into with the same trustees as those of the first settlement.

Mr. *Kay*:—I think not. The will does not assert any intention of exercising the power.

The word "children" throughout the settlement of 1837 has, no doubt, an ambiguous meaning; but it is explained by the gift in default of children, which is to the settlor absolutely; so that if there had been no children of the first marriage, those of the second would clearly have been excluded.

Mr. *Amphlett*, Q.C., and Mr. *Lawrance*, for the widow and executrix:—

Whether the first settlement did or did not comprise all the children of the settlor, the power was never released, and, consequently, the whole fund goes to the widow for life, and after her death to her seven children, exclusively of the others.

The VICE-CHANCELLOR:—My present opinion is, that all the children were included, and that the power was effectually released.

Mr. *Amphlett*:—If your Honour holds that all the children of the settlor were included in the settlement of 1837, how is it possible to say that the power of appointment was released by the deed of 1848, as to the shares of the seven children who were then unborn?

But rather than argue against the interest of the widow's children, we, on behalf of the widow, give up the contention.

Mr. *Karslake*, Q.C., and Mr. *Cates*, for the children of the second marriage.

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SIR W. M. JAMES, V.C.:—

I am of opinion that there was a good equitable release on the part of the settlor, on the ground that the power was an equitable power, and the trustees of the original settlement were parties to the covenant, whereby the donee of the power, in effect, assured them he never intended to exercise the power.

I am of opinion that the settlor having, by a deed between him and the trustees in whom the fund was vested, told them that he would forego the power, that was as good as if he had said in so many words, "I release the power." He seems to have thought that the result of that would be, that it would be a release entirely for the benefit of the four children of the first marriage. But that cannot alter the construction of the original settlement; and upon the construction of the original settlement I am of opinion that all the eleven children are entitled. It does not seem to me that there is really any such inconsistency in this provision as to make it absurd or unreasonable. It was a provision which the first wife was getting for herself and her children. She might reasonably say, "I am quite willing to give my husband full power of dealing with the fund; but subject to that if there are children by me and children by any other wife they shall share equally." That would not be an unreasonable bargain; therefore I do not see any inconsistency in the provision.

There will be a decree that the power is released, and that the property belongs to the eleven children.

The one-eleventh of the child who acquired a vested interest and died will go to the father's estate, and must be transferred to the second suit.

The costs of the first suit will come out of the trust fund, those of the second out of the testator's estate, or, failing that, out of the trust fund, the point having been a very fair one to be raised.

Solicitors: Messrs. *Janson, Cobb, & Pearson,* and Mr. *W. Elgood,* agents for Mr. *W. P. Hughes, Worcester.*

V.-C. J.
1870
Jan. 12.

UMBERS *v.* JAGGARD.

Will—Real Estate—"Entitled"—Tenant in Tail in Remainder.

Testator devised real estate to and to the use of trustees and their heirs in trust for his nephew *W.*, son of his brother *E.*, and his other sons in tail male, remainder to the first and other sons of his (testator's) brother *A.*; remainder to the first and other sons of his (testator's) brother *S.*; remainder to the second and other sons of his (testator's) brother *E.* in tail male; with remainder over. He empowered his trustees during the minority of any infant tenants in tail, "or other persons for the time being entitled" under the trusts, to grant leases; and also during the minority of any tenant for life, in tail, or in fee, "entitled to the present possession" of the estates, to manage the estates, and accumulate the surplus towards maintenance and education. Testator then bequeathed his residuary personalty to the trustees upon trust to pay and transfer the same unto and equally amongst all his nephews and nieces living at his decease, except *W.*, "or other the person or persons entitled" to the estates.

At the time of testator's death *W.* was dead, an infant, and never married; *A.* and *S.* were living, and the second son of *E.* was living, an infant. Testator left four nephews and nieces, besides the second son of *E.*

S. had since died, not having been married; the second son of *E.* had attained twenty-one. *A.* was living, aged sixty-eight, and not married:—

Held, that the second son of *E.*, being tenant in tail expectant on the failure of sons of his uncle *A.*, was not "entitled" to the real estates within the meaning of the will; and was not excluded from participating in the personal estate.

Special Case.

Thomas Umbers died on the 2nd of July, 1849, having by will, dated the 5th of February, 1848, after directing his debts, funeral and testamentary expenses, and legacies, to be paid out of his personal estate, devised his freehold lands and hereditaments unto and to the use of trustees, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, out of the rents and profits, or by mortgaging or charging the devised estates, to levy and raise the sum of £9000 in aid of his personal estate; and subject thereto, in trust for his nephew, *William John*, son of his (testator's) brother *Edward*, for life, without impeachment of waste, and after his decease, in trust for his first and other sons in tail male; and failing such issue, in trust, subject to a sum of £900 thereinafter directed to be raised and charged

on the estates, for the first and other sons of his (testator's) brother *Abraham* in tail male; and on failure of such issue, in trust for the first and other sons of his (testator's) brother *Samuel* in tail male; and on failure of such issue, for the second and other sons of his (testator's) brother *Edward* in tail male; and on failure of such issue, in trust for his (testator's) own right heirs. The testator empowered his trustees during the minority of his nephew, and after he should attain twenty-one, with his consent in writing, and also "during the minority or respective minorities of any infant tenant or tenants in tail, or other persons for the time being entitled under the trusts aforesaid, in the discretion of his said trustees or trustee," to grant leases; and also, "during the minority of any tenant for life, in tail, or in fee, entitled to the present possession, or to the rents and profits," of the hereditaments, to receive the rents and profits, and manage the estates, and apply the surplus towards the maintenance and education of the persons entitled thereto, and invest the remainder, with power to resort to the accumulations for future maintenance and education. Testator then directed that in case his nephew *William John* should die, and there should be a failure of issue male of his body, his real estates should be charged with £900 in addition to the £9000, and he bequeathed the £900 to his brother *Edward*. Testator then gave several pecuniary and specific legacies, and bequeathed all his personal estate not specifically bequeathed to the trustees upon trust to sell and stand possessed of the proceeds upon trust to pay debts and legacies. Testator then bequeathed the residue of his personal estate and effects as follows:—

"And as to the residue of all my said personal estate and effects, . . . I direct my said trustees to stand possessed of, and to pay and transfer the same unto and equally amongst my nephews and nieces living at the time of my decease, except my said nephew, the said *William John Umbers*, or other the person or persons entitled to my said real estates by virtue of the limitations hereinbefore contained, and the children of such of them as shall be dead, such children only to take the share their parent or parents would have been entitled to if he, she, or they had been living."

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William John Umbers died in the testator's lifetime, under twenty-one, and not having been married.

Abraham Umbers was living, aged sixty-eight, and had never been married.

Samuel Umbers died on the 27th of December, 1868, never having been married.

Edward Umbers, the second son of *Edward*, the testator's brother, was born after the date of the will, but before the testator's death, and was still living. He attained twenty-one on the 1st of March, 1869.

Besides this *Edward*, there were four nephews and nieces of the testator living at his death, *Elizabeth*, wife of *William Thomas Jaggard*, *Mary Jaggard Umbers*, *Sarah Elizabeth Umbers*, and *Ann Jaggard*, wife of *Christopher William Cattell*.

Mary Jaggard Umbers had since married *John Holyoake*.

Ann Jaggard Cattell died on the 30th of September, 1868.

The case was between *Edward Umbers* the younger, as Plaintiff, and Mr. and Mrs. *Jaggard*, *C. W. Cattell*, Mr. and Mrs. *Holyoake*, *Sarah E. Umbers*, and the surviving trustees of the will, as Defendants; and the sole question was, whether the Plaintiff (who was tenant in tail in remainder expectant on failure of sons of his uncle, *Abraham Umbers*) was or was not entitled to a share of the residuary personal estate.

Mr. *V. Hawkins*, for the Plaintiff:—

The words "the person or persons entitled to my said real estates by virtue of the limitations hereinbefore contained" do not include the Plaintiff.

The word "entitled," means "entitled in possession," as is sufficiently shewn by the terms of the power of leasing which is given to trustees during the minority of the person "for the time being entitled" under the trusts of the deed; and also by the subsequent clause.

The VICE-CHANCELLOR:—Who is in possession now?

Mr. *V. Hawkins*:—The heir-at-law is now in possession; and the devise to the Plaintiff cannot take effect as a contingent

remainder, but only as an executory devise: *Countess of Bective* v. *Hodgson* (1).

The excluded persons must be ascertained at the testator's death; and at that date, I submit, the Plaintiff was not "entitled." The only person who could have been excluded was *William John Umbers,* who would have been excluded had he been living. It is only unless there was some nephew or niece in possession at the death of the testator that it would have been reasonable to exclude a nephew or niece.

Mr. *Ince,* for the Defendants :—

There is an antecedent improbability that the testator intended the Plaintiff to get a share of the personal estate, as well as the whole of the realty.

The testator must be supposed to have anticipated the death of *William John Umbers* in his lifetime; and the will speaks from the death.

The words "entitled to," it is submitted, mean "having title to" my property at the time of my death.

The construction contended for on the other side requires that certain words, as "for the time being" entitled, or, entitled "in possession," should be read into the will.

Sir W. M. James, V.C.:—

I think the Plaintiff is entitled to a share of the personalty.

He is a nephew, and therefore entitled to a share, unless he be excluded by the subsequent words. Those words are, "except my said nephew, the said *William John Umbers,* or other the person or persons entitled to my said real estates by virtue of the limitations hereinbefore contained."

At the present moment the Plaintiff is not entitled; and he may never become entitled.

The question must be answered in the affirmative.

Solicitor: Mr. *C. W. Cattell.*

(1) 10 H. L. C. 656. 10 Jur NS 373.

V.-C. J.
1870
Jan. 19.

42. 612.

BIRD *v.* HARRIS.

Will—Bequest to Executors "in consideration of" paying the Income to the Wife for Life—Intestacy as to Reversion—No beneficial Gift to Executors.

Testator bequeathed all his property to two persons whom he appointed executors (one being a neighbouring farmer, the other a surgeon called in during his last illness to make the will) "in and for the consideration of" paying over the rents and profits to his wife for life:—

Held, that the executors did not take beneficially, but that the estate, subject to the widow's life interest, was undisposed of.

RICHARD BIRD, by his will, dated the 24th of September, 1867, devised and bequeathed all his property, real and personal, to *Isaac Harris*, farmer, and *Thomas Collier*, surgeon, "in and for the consideration of paying over" the income (after deducting rates and taxes on the same) to his wife, *Rebecca Bird*, during her natural life. He then appointed *Harris* and *Collier* his executors, and directed them to pay all his funeral and testamentary expenses. There was no devise or bequest of the reversion. Testator was a farmer, Mr. *Harris* was a neighbouring farmer, and Mr. *Collier* was a surgeon, called in by the testator during his last illness to make the will.

Testator died on the 29th of September, 1867.

His daughter, on behalf of herself, and the other co-heirs and next of kin, filed a bill for a declaration that they were entitled to the reversionary interest.

The Defendant *Harris* claimed the reversionary interest beneficially.

The Defendant *Collier* made no claim, but submitted his rights.

Mr. *Fry*, Q.C., and Mr. *Rodwell*, for the Plaintiff.

The VICE-CHANCELLOR called upon

Mr. *Kay*, Q.C., and Mr. *Field*, for the Defendant *Harris*:—

The cases establish this, that if you find words which amount to a gift of an estate to executors, "charged and chargeable with" debts, legacies, or annuities, they take beneficially, subject to the

charge; but if the words amount to this, "I give you this property upon a trust," which trust does not exhaust the whole estate, then the executors, being unable to get rid of their trust, hold the estate for the benefit of the heir-at-law or next of kin: *Dawson* v. *Clark* (1); *King* v. *Denison* (2); *Barrs* v. *Fewkes* (3).

These words are not like a declaration of trust. They are "in and for the consideration" of paying the income to the widow. Suppose the testator had said, "In consideration of your paying my wife an annuity," would not that have been a charge?

But here the meaning is, "I give you the estate beneficially in consideration of" your doing something, which is very much stronger than the words "charged and chargeable with." The words are more an indication of an intention that the executors should take beneficially, than a mere charge.

The surrounding circumstances do not render it improbable that he intended these persons to take beneficially.

Mr. *Amphlett*, Q.C., and Mr. *C. Dale*, for the Defendant *Collier*.

SIR W. M. JAMES, V.C.:—

In this case I am of opinion that the persons named in this will do not take any beneficial interest.

These two persons are named as executors, and, *primâ facie*, they take the whole of the personal estate in that character. Then there is a gift of all the real and personal estate, after payment of funeral and testamentary expenses, to these two persons, who were not connected by relationship with the testator—one being a neighbour, the other a doctor called in by the testator during his last illness to make the will itself—followed by these words, "in and for the consideration of" paying over all the yearly rents, interests, and profits arising from the same to his wife.

The question is, what is the meaning of these words "in and for the consideration of." In truth, they have no proper grammatical meaning at all; no consideration passed; the executors only had to pay over the rents and profits.

I am of opinion that no other construction can be put upon these words than that they are equivalent to "for the purpose of."

(1) 15 Ves. 409; 18 Ves. 247. (2) 1 V. & B. 260. (3) 2 H. & M. 60.

V.-C. J. 1870 BIRD v. HARRIS.

If so, the beneficial interest in the property after the death of the widow is undisposed of; and the realty goes to the heir, and the personalty to the next of kin.

The costs of all parties (the Plaintiff not opposing) will come out of the estate.

Mr. *Fry* asked for a receiver.

The VICE-CHANCELLOR said no; the lady ought to be put into possession at once, and of course she would have to pay the rates and taxes; but she must bring the deeds into Court.

Solicitors: Messrs. *Dale & Stretton*, agents for Mr. *Whitton, Towcester*; Messrs. *Field, Roscoe, & Co.*

V.-C. J. 1869 *Dec.* 16, 17.

FREEMAN *v.* POPE.

Voluntary Settlement—13 *Eliz.* c. 5—*Subsequent Creditor.*

If at the time of executing a voluntary settlement the settlor is indebted, and in the result any prior creditor is delayed in payment of his debt, then, however solvent the settlor may have been at the time, and however free from any fraudulent intention the settlement may have been, it may be set aside at the suit of a subsequent creditor.

THIS was a suit by a subsequent creditor for the purpose of setting aside a voluntary settlement of a policy of assurance, as being fraudulent and void, under 13 Eliz. c. 5, as against the creditors of the settlor.

The settlement in question was dated the 3rd of March, 1863, and by it the Rev. *John Custance*, incumbent of *Blickling* and *Erpingham*, *Norfolk*, and then aged seventy-five, "as a return for the kindness and attention he had experienced at the hands" of his goddaughter, *Julia Thrift*, assigned to *George Pope*, *William Rushmore*, and Mrs. *Walpole*, as trustees for her benefit, a policy of assurance in the *Pelican Company* for £1000 on his own life, with a covenant by him to pay the annual premiums upon the policy.

It appeared that *Custance* had some years before March, 1863, settled the policy upon *Julia Thrift*, but revoked such settlement

in December, 1861, in order, as it was alleged, to receive a cash bonus which was declared about that time.

The livings of *Blickling* and *Erpingham* were of the annual value of £815, and the settlor was also possessed of an annuity of £180 for his life, and a copyhold cottage at *Catton*, in *Norfolk*. At the date of the voluntary settlement the settlor was indebted to various unsecured creditors in considerable sums of money, and also to Messrs. *Gurney*, his bankers, in the sum of £489 on the balance of his banking account. To enable him to arrange with his creditors, Mrs. *Walpole* (mother of *Julia Thrift*, and one of the trustees on her behalf in the voluntary settlement), who had lived with him as his housekeeper for many years and managed his affairs, advanced the settlor £350, and as a security for the repayment of this advance *Custance*, on the 3rd of March, 1863, executed to Mrs. *Walpole* a bill of sale of all his furniture and effects. He also, on the 3rd of March, in consideration of £50, surrendered the copyhold cottage to her use. The £350 thus borrowed was applied by *Custance* in payment of his debts, other than that to the bankers, and an arrangement was made with Messrs. *Gurney* for liquidating their debt by half-yearly instalments (with interest), of £50. By these instalments the debt was reduced at the death of the settlor in April, 1868, to £117 15*s.* 10*d.*

Towards the end of 1867, *Custance* was again considerably involved, and several of his creditors took legal proceedings against him.

The annuity of £180 was about this time made over to Mrs. *Walpole*, in order to support him, as the livings were under sequestration.

In February, 1868, an arrangement was made for paying the creditors 15*s.* in the pound, and £600 was borrowed by the settlor from a Mrs. *Howes*, on security of a bill of sale over his furniture. Mrs. *Walpole* assisted this arrangement by consenting to postpone her bill of sale, and by giving Mrs. *Howes* a mortgage over the *Catton* copyhold property. The settlor died on the 21st of April, 1868, before this arrangement was carried out.

Mrs. *Howes*, upon the death of the settlor, at once enforced her bill of sale, but the furniture and effects were stated not to have realized enough to discharge the amount due to her, and there were no assets.

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Administration had been taken out by the Defendant *Chamberlin*, who was a creditor of the settlor for £37 15*s.* 6*d.* The Plaintiff, a grocer, was a creditor for £62 12*s.* 8*d.*, for goods supplied to the settlor since March, 1863, and there being no assets of the testator for payment of his debts, the bill was filed by the Plaintiff on behalf of himself and all other unsatisfied creditors of the Rev. *John Custance*, charging, that the effect of the voluntary settlement, and of the bill of sale and surrender, all of which were executed on the same day, was to divest the settlor, who was then utterly insolvent, of all his available property applicable to the payment of his debts; that such settlement was executed for the express purpose of delaying, hindering, and defrauding his future creditors, and under the circumstances was fraudulent and void, not only as against creditors prior to the settlement, but also as against Plaintiff and other subsequent unsatisfied creditors. The bill prayed an account, a declaration to the above effect, and that the moneys secured by and payable under the policy of assurance might be applied and administered accordingly, and that the settlement might be delivered up to be cancelled.

Besides the *Gurneys* and Mrs. *Walpole*, the only creditor prior to March 3, 1863, whose debt was still unpaid, was *Breeze*, a horse-keeper, who was owed £10 13*s.* 6*d.*, of which £7 8*s.* 6*d.* was incurred before March, 1863.

Mr. *Kay*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiff:—

If not actually insolvent at the time of the voluntary settlement the settlor was substantially indebted; and, having already given a bill of sale over his furniture and surrendered his copyhold property, he, knowing that he had debts, assigned away the only property that would be available for creditors at his death. The inference, therefore, is irresistible that the settlement was made for the purpose of defrauding creditors. In order to avoid such a settlement, it is not necessary to prove actual fraud, or to shew that the settlor was insolvent at the time: *Richardson* v. *Smallwood* (1). So long as any debt incurred at the date of the settlement remains unsatisfied, the intent to defraud is sufficiently made

(1) Jac. 552.

out, and subsequent creditors, who would have been allowed to come in *pro ratâ* in a suit by a prior creditor, may now themselves file a bill to set aside the deed: *Jenkyn* v. *Vaughan* (1); *Spirett* v. *Willows* (2); *Lewin* on Trusts (3): and it is no objection to the suit that the settlement was executed some years before bill filed; *Taylor* v. *Jones* (4).

[They also cited *Adames* v. *Hallett* (5).]

Mr. *H. Fellows*, for the administrator, supported the Plaintiff's contention, and referred to *French* v. *French* (6); *Stokoe* v. *Cowan* (7).

Mr. *Morgan*, Q.C., and Mr. *H. A. Giffard*, for the Defendant *Pope*, the husband of *Julia Thrift*, and assignee from her of the policy of assurance:—

No case is made for setting aside this voluntary settlement. The bill being filed by a subsequent creditor whose debt had not been contracted at the date of the settlement, "it is necessary to shew either that the settlor made the settlement with express intent to delay, hinder, or defraud creditors, or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency:" *Spirett* v. *Willows* (8). In this case the settlor was in no sense of the word insolvent. He had an income of £1000, and, with the exception of his secured creditors, the bankers, and Mrs. *Walpole* (a party to the deed, and therefore incapable of impeaching it), he was indebted only in the ordinary course, as for current expenses which he had the means of paying, and therefore the deed cannot be impeached: *Lewin* on Trusts (9), and cases there cited: the true test being, whether there was such a disparity between the means reserved to the settlor and not included in the settlement and his debts, as to leave no reasonable prospect of paying them: *Skarf* v. *Soulby* (10). As to the nature of the property withdrawn from the creditors, a policy of assurance,

(1) 3 Drew. 419.
(2) 3 D. J. & S. 293.
(3) Pages 63–4.
(4) 2 Atk. 600.
(5) Law Rep. 6 Eq. 468.
(6) 6 D. M. & G. 95.
(7) 29 Beav. 637.
(8) 3 D. J. & S. 303.
(9) Page 62.
(10) 1 Mac. & G. 364, 375.

V.-C. J. 1869 FREEMAN v. POPE.

though assets within the statute 13 Eliz. c. 5, *Stokoe* v. *Cowan* (1), was not an asset of a very useful or available kind for creditors. The Court must be satisfied that the intention of the settlement, taking the whole transaction together, was to defraud the persons who were at the time creditors of the settlor: *Holmes* v. *Penney* (2). Any such intention is here disproved, as arrangements were at the time being made by the settlor, and afterwards carried out, not for defrauding, but for satisfying his creditors: while as to the motive for the settlement, he was only giving effect to his intention of providing for his goddaughter expressed by an earlier (but revoked) settlement in her favour of this very policy.

SIR W. M. JAMES, V.C.:—

Were this case absolutely free from authority, I should have thought that the question I had to put to myself under the statute was, in the words of the statute, whether there was actually any intention by this settlement on the part of the settlor "to defeat, hinder, or delay his creditors." If I were a special juryman to whom such a question were put to me by the judge, I should, upon the facts of this case, come to the conclusion that this gentleman had no such intention whatever. I am satisfied that he had not any idea whatever of defrauding or cheating his creditors by making that settlement in favour of his goddaughter of the policy of assurance, which he had made several years before in her favour, when there was no pretence for supposing that he was at all in embarrassed circumstances. But, sitting here as Vice-Chancellor, I am bound, as it seems to me, by two decisions; one of Lord Chancellor *Westbury*, *Spirett* v. *Willows* (3), and another of Vice-Chancellor *Kindersley*, *Jenkyn* v. *Vaughan* (4). The decision of Vice-Chancellor *Kindersley* is, that if there be a creditor subsequent to the deed, and there be also at the time of filing the bill an unpaid creditor prior to the deed, the subsequent creditor has exactly the same right to file a bill as the prior creditor has; that is to say, I am to try the case at the suit of the present Plaintiff, as if the bankers, and not he, were the Plaintiffs. Then, assuming it to be the suit of the bankers,

(1) 29 Beav. 637. (3) 3 D. J. & S. 293.
(2) 3 K. & J. 90, 99. (4) 3 Drew. 419.

it appears to me that I am equally bound by the decision of Lord *Westbury* in *Spirett* v. *Willows*, though I confess I cannot follow the reasoning. He says (1) "The Plaintiff sues as a creditor to set aside a voluntary settlement or deed of gift made by the Defendant, his debtor. The Plaintiff's debt was contracted before the time of making the settlement. He has since recovered judgment at law, and the debtor has become bankrupt. The Plaintiff complains, in the words of the statute of *Elizabeth*, that his judgment and execution are hindered, delayed and defrauded by the conveyance of the goods and chattels of his debtor made by this voluntary settlement. The defence is, that at the time of making the settlement the debtor reserved and had property enough to pay the Plaintiff and all his other creditors in full, and that the settlement, therefore, is not fraudulent, because the debtor remained solvent after he had made it. There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors, but I think the following conclusions are well founded: If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shewn that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." That is to say, it is immaterial whether the debtor had any intention whatever of defeating his creditors; but if in the result, from some accident, a small debt remained unpaid for some years, and by reason of a voluntary settlement and subsequent insolvency of the debtor the creditor was delayed in the payment of his debt, then, however honest the settlement was, however solvent the settlor was at the time, if at at the time he had £100,000 and put £100 in the settlement, and a creditor for, say £10, happened to be unpaid in consequence of the settlor losing his money in the interval, that would be quite sufficient to set aside the voluntary settlement. That is the decision of Lord *Westbury*. I am bound by that decision, and, therefore, although bound to express my extra-judicial opinion that this gentleman, having regard to his income and his means, had no intention whatever to cheat his creditors at that time, I must judicially declare this settlement to be fraudulent and void as against his creditors.

(1) 3 D. J. & S. 302.

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Dec. 20. THE VICE-CHANCELLOR mentioned the case again, and directed an inquiry whether any and which of the creditors of the settlor had acquiesced in the voluntary deed.

Solicitors: Messrs. *Sole, Turner, & Turner,* agents for Messrs. *Miller & Son, Norwich;* Messrs. *Paterson, Snow, & Burney.*

V.-C. J. 1869 *Dec.* 16, 23.

DUGDALE *v.* MEADOWS.

Succession Duty—Succession Duty Act (16 & 17 *Vict. c.* 51), *ss.* 20, 42.

17 Ch D 112-5

Lands charged with payment of a jointure were settled, and a power of sale, with the consent of the tenant for life for the time being, was thereby given to the trustees. A portion of the property was sold with the consent of the tenant for life and the jointress:—

Held, that the land sold would not be subject to succession duty on the determination of the jointure, and that the purchaser must complete without indemnity against it.

Affirmed by C A 6 Ch 501

SPECIFIC PERFORMANCE.

By the marriage settlement of Sir *Robert Howe Bromley*, made in June, 1812, the *Bromley* estates, which were of considerable value, were settled to the use of Sir *R. H. Bromley* for life, with remainder to trustees to preserve contingent remainders, with remainder to the use that Dame *Anne Bromley* (in case she should survive her husband Sir *Robert*) should after his death receive the yearly rent-charge of £1650, with remainder to the use of trustees for the term of ninety-nine years for securing such rent-charge, and subject thereto to the use of the first and other sons of the marriage in tail male.

In 1851 the property comprised in the settlement of 1812 was resettled by Sir *Robert H. Bromley*, and his eldest son, now Sir *Henry Bromley*. Subject to certain uses not material to be stated, the property was settled to the use of Sir *Robert* for life, with remainder to the use of Sir *Henry* for life, with remainders over. The settlement contained a power for the trustees, by the direction in writing of Sir *Robert* during his life, and after his death by the like direction of the person or persons who for the time being, by

The conclusion of this dictum is not admitted by the Crown see 2 Dav & Cur 4th Ed 813 n (a)

virtue of the limitations thereinbefore contained, should be in the actual possession of, or entitled to, the rents, issues, and profits of the premises thereinbefore appointed, or any part thereof, if such person or persons respectively for the time being should be of full age, to sell all or any part of the hereditaments thereinbefore appointed in strict settlement, or intended so to be, and the inheritance thereof in fee simple, to any person or persons whomsoever for such price or prices in money as to the person or persons giving such direction should seem reasonable. It was also provided that the trustees should lay out the moneys to arise by any sale in the purchase of other hereditaments, and the aforesaid power might be exercised without reference to the immediate reinvestment of the moneys to arise by any such sale; the hereditaments to be purchased to be settled upon the same trusts as were contained in the now stating resettlement, and were subsisting and capable of taking effect.

Sir *Robert Bromley* died on the 8th of July, 1857, and his wife Dame *Anne Bromley* survived him, and was still living.

In June, 1864, the trustees, in exercise of the powers of sale reserved to them and Sir *Henry Bromley*, and his mother Dame *Anne*, put up for sale by auction certain portions of the settled property.

The Defendant, who was the yearly tenant of one lot known as *Cream Lodge Farm*, attended the sale, and was declared the purchaser of such lot at the price of £5450. In his requisitions upon the title the purchaser insisted that the succession duty which would become payable upon the extinction of Dame *Anne's* jointure of £1650 was a charge on the estate, and declined to complete until such succession duty was commuted and paid (*Succession Duty Act*, s. 41), and the receipt produced; and that if it could not be then paid, an amount sufficient to answer the duty at the rate of £3 per cent. should be set aside out of the purchase-money to answer it.

The vendors refused to comply with this requisition, stating that the succession duty payable on the extinction of the jointure could not be paid until Dame *Anne's* death, as it was not known what rate of duty would then be payable. Other objections were raised, and the matter dragged on until April 1868, when the Defendant

V.-C. J. 1869 DUGDALE v. MEADOWS.

commenced an action for the recovery of the deposit money and costs incurred in investigating the Plaintiff's title. In May, 1868, the present bill was filed for specific performance of the Defendant's contract to purchase, and in restraint of his action at law.

The Plaintiffs, by their bill, insisted that the succession duty payable upon the extinction or determination of the jointure did not constitute a charge upon the property purchased, the discharge of which the Defendant was entitled to require previous to the completion of his purchase; but if the Court should be of opinion that the Defendant was entitled to require payment by Plaintiffs of the succession duty, they offered to pay it in advance, or otherwise to discharge the property from the liability (if any) affecting them in respect of the same.

It appeared that the property contracted to be purchased by the Defendant formed a very small portion only of the *Bromley* estates upon which the jointure was charged, and that the portion remaining unsold was of the value of £100,000 and upwards.

Mr. *Kay*, Q.C., Mr. *Morgan*, Q.C., and Mr. *E. W. Byrne*, for the Plaintiffs, contended that the objection taken by the purchaser was unfounded, being expressly met by sect. 42 of the *Succession Duty Act* (1).

They referred to *Wilcox* v. *Smith* (2).

Mr. *Eddis*, Q.C., and Mr. *F. Waller*, for the purchaser:—

The property sold by the trustees under the power of sale was sold subject to the jointure, which overrode the resettlement of 1851 and all powers therein contained, and the power cannot be carried out so as to divest the property sold from payment of succession duty when the jointure falls in. The purchaser will then be in possession of a property which has become more beneficial by the extinction of this charge, and being entitled to the beneficial enjoyment of the property, whose value has been thereby increased, he will, as the person who has acquired the benefit of the cesser of the earlier interest, be the "successor" within the definition contained in sect. 2, and chargeable under sect. 15 "with duty in respect thereof as a succession at the same time and at the same

(1) See this section stated in the judgment.

(2) 4 Drew. 40, 55.

rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created."

Sect. 42, which is relied upon by the Plaintiffs, does not apply, and we are entitled before completing the purchase, either to be indemnified against the future payment of the duty, or to insist that the Plaintiffs shall avail themselves of sect. 41, and get the duty presumptively payable commuted and paid.

Mr. *Kay*, in reply.

SIR W. M. JAMES, V.C. (after stating the object of the suit, continued):—

The estate was an estate in settlement under which there was a tenant for life in possession. There was the usual power vested in trustees for sale, for exchange, and re-investment. There was, anterior to the settlement, a charge by way of jointure, to a considerable amount, still existing. The purchaser, that is the person who entered into the contract for the purchase of the property from the trustees, says that he is entitled to have some provision made in respect of the succession duty. The tenant for life who is in possession is the successor. He has, of course, of necessity only been charged with, and has only paid succession duty upon, the net value of the property after deducting the existing jointure, and if and when the jointress should die in his lifetime no doubt he, as the successor, would be liable to pay succession duty upon the increase of the beneficial interest which will accrue to him in that event. It is this contingent liability to future succession duty which is the subject of the objection.

The purchaser says "I am in possession by way of alienation of the property, and I shall be liable to pay that succession duty, or any proportion of it, if that event should occur." I am of opinion that there is no foundation for that objection on the part of the purchaser. The matter seems to me to be clearly disposed of by sect. 20 of the *Succession Duty Act*, if it stood alone (1). [His Honour after read-

(1) Sect. 20: "The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits

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ing that section, continued:—] That is to say, the duty is to be assessed upon some person—upon the successor, or upon a person, in his right or in his behalf. In this case I am of opinion that the purchaser, who has purchased, not from the successor, but under the power vested in the trustees, is not a person upon whom any duty whatever could be imposed, for he is not in possession, nor can be said to be in possession, in right of, or on behalf of, the successor. True it is, in order to give him a title, it was necessary under the trusts of the settlement that the successor should assent to the alienation; and, apparently, that was considered by the framers of the Act as likely to create a difficulty. The successor being in possession liable to a contingent charge, it was thought that that contingent charge was one which he had no power to get rid of by concurring in or consenting to a sale, and therefore it was provided by sect. 42, that although the duty imposed by the Act was the first charge on the interest of the successor, and all persons claiming in his right, on all real property, still that that was not to interfere with the free alienation of the property in settlement under which the successor was tenant for life. It was therefore provided, that "where any settled real property comprised in a succession, shall be subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime, upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys."

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thereof; except that if there shall be any prior charge, estate, or interest, not created by the successor himself upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate, or interest, shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination." [The remainder of the section is not material.]

That is to say, the successor being here now liable contingently to the succession duty in respect of the jointure, he is not precluded from consenting to a sale, and the sale is not to be impeded by means of that; but he may consent, and the trustees, with his consent, may sell, and the result will be that the property that was acquired, or the money which results from that sale, is charged in substitution for the property now in existence in succession.

That being so, it seems to me there is no ground for the contention raised by the purchaser, and he must complete the purchase.

Solicitors: Mr. *Edmund Byrne;* Messrs. *Chilton, Burton, Yeates, & Hart,* for *E. H. M. Clarke, Melton Mowbray.*

ELMSLIE *v.* BOURSIER.

Patent—Sale in England of a Material made abroad by the Patent Process—Infringement.

The importation and sale in *England* of articles manufactured abroad according to the specification of an English patent is an infringement.

THIS was a bill originally filed by *James Augustus Elmslie* and *George Simpson* against *Lucien Marie Boursier* and *Émile Irlande,* praying that the Defendants might, during the continuance of certain letters patent dated in 1859, be restrained from importing into *England,* and from selling, disposing, or making any profitable use in *England* of any tin-foil made in any foreign country according to the invention, or by the machinery and apparatus described in the specification, or from in any manner infringing the rights and privileges granted by the letters patent. The bill also prayed for an account of all tin-foil made in any foreign country according to the invention or by the machinery or apparatus which had been imported into, or sold or disposed of or used in *England* by the order or for the use of the Plaintiffs, or either of them, and of the profits so made; also for delivering up of the tin-foil in the possession of the Defendants, or either of them, so made, and for damages.

V.-C. J. 1869 ELMSLIE v. BOURSIER.

The letters patent were granted on the 23rd of March, 1859, to *John Henry Johnson* for an invention of "Improvements in Machinery or Apparatus for the manufacture of Sheet-tin," a communication from abroad by *Jean Baptiste Ferdinand Masson*, of *Paris*.

The substance of the invention was a method of making tin-foil by melting and casting the metal, instead of by the old process of rolling, which was in common use.

By a deed of the 31st of May, 1861, the letters patent were assigned by *Masson* and *Johnson* to the Plaintiffs *Elmslie* and *Simpson*, for the residue of the term.

In the year 1865 the Defendant *Boursier* purchased from *Masson* his tin-foil manufactory at No. 20, *Rue de Chalons, Paris*, his business, and all his patent rights in *France;* and the agreement, which was in French, and dated the 20th of March, 1865, contained the following clause:—

"*A l'égard de tous autres pays, l'Angleterre exceptée, pour laquelle M. Masson a déjà pris un brevet qui a été vendu par lui, et dont il est bien entendu qu'il conserve le prix intégral, M. Boursier pourra prendre à son profit, s'il le juge à propos, et si la législation de ce pays le permet, des brevets d'invention et d'importation.*"

The bill alleged, and the answer admitted, that in March, 1866, the Defendant *Boursier* consigned, from his manufactory in the *Rue de Chalons* to the Defendant *Irlande*, an importer of French goods, carrying on business at No. 44, *Redcliffe Road, West Brompton, Middlesex*, several parcels of tin-foil made according to *Masson's* invention.

The Plaintiffs having discovered this, and having been told, on expostulation, that the Defendant *Boursier* intended to stand on his rights, filed this bill on the 16th of July, 1866.

Since that date the Plaintiff *Simpson* had died; and the Defendant *Irlande* had become bankrupt. The executors of *Simpson*, and the assignees of *Irlande*, had been made Defendants by amendment; but no relief was sought at the hearing against any one except *Boursier*.

On the 23rd of November, 1866, *Boursier* filed his answer, in which he reserved the right of contesting the validity of the

patent on the ground of prior publication. He said he was utterly unable to distinguish tin-foil made according to *Masson's* patent from tin-foil made in the ordinary way. He admitted the consignments to *Irlande*, and said that *Masson's* patent did not "in any way relate to any substance or ingredients used in the manufacture of tin-foil, but solely to the construction and arrangement of machinery or apparatus for the manufacture itself." He said it was not his intention to use or vend in *England* those of *Masson's* inventions for which the English patent was obtained; he had not sought, and had no intention of seeking, any license from the Plaintiffs; and he claimed the right to import and sell in *England* any of the "products" manufactured by him abroad as he might think fit, and denied that such importation or sale was or would be in any manner "an infringement of the English patent, or a violation of any of the rights and privileges thereby purporting to be conferred."

Amongst certain admissions signed on the 5th of December, 1868, was the following: "The said letters patent are valid, subsisting, and sufficient in every respect."

Mr. *Grove*, Q.C., and Mr. *W. N. Lawson*, for the Plaintiff:—

The sole question is one of law, namely, whether the holder of an English patent for a process of manufacturing goods has a right to prevent the importation into and sale in *England* of goods made by that process in a foreign country.

There is no dispute of fact, except as to whether the different arrangement of particles makes cast tin-foil a material essentially different in substance from rolled tin-foil, and whether the goods manufactured by the new processes are distinguishable on inspection; we say they are different, and are distinguishable; but we consider these points of no importance.

As to the language of the letters patent, it will be observed that sect. 54 of 15 & 16 Vict. c. 83, enacts that "the several forms in the schedule to this Act may be used;" and the schedule provides a form of letters patent; but the form actually in use and used in these letters patent is, as far as is material, as follows:—

. . . "Know ye, therefore, that we . . . do give and grant unto the said *A. B.*, his executors, administrators, and assigns, our . .

V.-C. J. 1869 ELMSLIE v. BOURSIER.

especial license . . . . that he, the said *A. B.*, shall and lawfully may make, use, exercise, and vend his said invention within our *United Kingdom* . . . in such manner as to him, the said *A. B.*, his executors, administrators, or assigns, or any of them, shall in his or their discretion seem meet; and that he, the said *A. B.*, his executors, administrators, and assigns, shall and lawfully may have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years herein mentioned." . . .

This shews that not merely the right of manufacture, but the proceeds of sale of the product, are made over to the patentee. The question of the right to prevent the vending in this country of an article made in this country according to a process patented here, has been decided over and over again: *Minter* v. *Williams* (1); *Gibson* v. *Brand* (2). The rule is wholly independent of notice or knowledge on the part of the vendor; the *scienter* has nothing to do with it.

But it is said you may have a patent protecting a particular process or machine in *England*, but you cannot prevent the sale in *England* of articles made abroad by the same process. This point has, we contend, been decided the other way in *Walton* v. *Lavater* (3); *Betts* v. *Neilson* (4).

The VICE-CHANCELLOR called upon

Mr. *Willcock*, Q.C., and Mr. *Locock Webb*, for the Defendants:—

We admit at once that had this article been made in *England* the manufacture would have been an infringement, and we should not have been able to resist an injunction as to that.

But it is otherwise as to the sale in *England* of an article manu-

(1) 4 A. & E. 251; 5 Nev. & M. 647; 1 Webster, Pat. Cas. 135; and commented on, 8 C. B. (N.S.) 190.

(2) 1 Webster, Pat. Cas. 627, 630.

(3) 8 C. B. (N.S.) 162, 178, 185–6.

(4) Law Rep. 3 Ch. 429. Plaintiff's counsel intended also to have cited *Caldwell* v. *Vanvlissengen* (9 Hare, 415), and to have referred to the 26th section of the *Patent Law Amendment Act* (15 & 16 Vict. c. 83), which was inserted in the statute in consequence of that decision, and in which the proviso, they were prepared to contend, governed the precise point at issue in the present case.

(3 Sc & Jun Rs 1254

factured by the patented process in *France*. We have a perfect right to manufacture in *France*, and to sell our products where we please. All we cannot do, is to manufacture by M. *Masson's* process in *England*.

There is no novelty in tin-foil; it is an article which has been made for years, and is made daily by perfectly open and unprotected processes in *England;* nobody can distinguish one sort of tin-foil from another, and hence it is only one particular mode of making it that is protected, not the thing itself. In *Betts's* patent what was protected was the product, namely, the capsule; not the process of combining the lead and tin by pressure.

Hindmarch says (1), "If a patentee has invented an improved lace machine, and obtained a patent for it, the sale of a machine made according to the patentee's invention would be an infringement; but the sale of lace or any other article made by means of the patent machine would be no infringement of the patent; for the patentee's invention is the art of making the improved lace machine, and that art is not used, within the meaning of the patent, by a person who merely uses the machine to produce a piece of lace." Substituting the words "tin-foil" for "lace," the above passage exactly applies.

Minter v. *Williams* merely shews that offering for sale is not equivalent to selling; not that selling would necessarily be an infringement (2). In *Gibson* v. *Brand* (3) it does not appear that the jury found the Defendants guilty on the ground of selling; the breach assigned was, that the Defendants "directly or indirectly made, used, and put in practice" the invention; and it does appear that the Defendants not only sold but made the silk; so that the manufacture alone may have been the ground of the verdict.

In *Walton* v. *Lavater* (4) the Defendant had imported from *France* large quantities of the patent articles, that is to say, things called "pneumatic pegs," each of which bore his name; a very different thing from selling such an article as flour, lace, or this tin-foil, which, as we say, bears on the face of it no trace of the process by which it was made.

(1) Law of Patent Privileges, p. 492, l. 4.
(2) 8 C. B. (N.S.) 18[illegible].
(3) 1 Webster, Pat. Cas. 627.
(4) 8 C. B. (N. S.) 162.

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SIR W. M. JAMES, V.C.:—

I am of opinion, both upon principle and upon the authorities, that the doing what is admitted to have been done by these Defendants is a violation of the rights granted to the Plaintiff by the letters patent.

The Plaintiff has, by a lawful grant from the Crown, under the statute, obtained the right to "make, use, exercise, and vend" his invention within the *United Kingdom* in such manner as he thinks fit; and the right to have and enjoy "the whole profit, benefit, commodity, and advantage" accruing and arising by reason of the said invention.

Now, one of the most useful of inventions is that of a process by which a common article may be made more economically than it was made before.

It is said that tin-foil can be made by the Plaintiff's process at less cost than by the old method; and it is conceded that nobody in *England* can use the Plaintiff's process of making cast tin-foil, as distinguished from rolled tin-foil, without a license from the Plaintiff. If that cannot be done in *England*, it would be a very strange thing if a person in *England* could send an order to some one in *France*, get the same thing manufactured there in exactly the same way, and bring it here so as to compete with the person to whom the Crown has granted "the whole profit, benefit, commodity, and advantage" arising from the patent. It would be a short mode of destroying "every profit, benefit, commodity, and advantage" which a patentee could have from such a thing, if all that a man had to do was to get the thing made abroad, import it into this country, and then sell it here in competition with the English patentee.

I am not sure that there is that distinction between this case and that of *Betts* v. *Neilson* (1) which Mr. *Willcock* asserted. There, two metals were used, and the patent was for the process by which they were combined in order to make the articles which were sold. Here, the material which is produced by the patented process is cast tin-foil; and very probably cast tin-foil is a different thing in its structure from rolled tin-foil; just as cast iron is a different

(1) Law Rep. 3 Ch. 429.

thing from bar iron. I apprehend, therefore, if it had rested on that narrow ground, that the Court would find sufficient in the fact that this is tin-foil produced by casting, whereas formerly all tin-foil was produced by mechanical pressure.

It has been said that the embarrassment to trade will be immense if the sale of tin-foil is to be restricted in this way. I do not see that that follows. Of course, if the Plaintiff cannot distinguish tin-foil made according to his process from other tin-foil, he may never be able to stop the sale. But if it is distinguishable, the person who asserts that it is so, is no more able to distinguish it than anybody else; so that no embarrassment would arise.

I am of opinion, in this case, that the obtaining from abroad and selling in this country an article manufactured according to the specification of a patent, is a violation of the privileges granted by the letters patent, and there must therefore be a decree for an injunction, and an account as prayed, with an inquiry as to damages, and the costs of the suit; following the decree in *Betts* v. *Neilson* (1).

The bill will stand dismissed as against *Irlande*, upon an understanding as to his costs that has been come to between the parties.

Solicitors for the Plaintiff: Messrs. *Elmslie, Forsyth, & Sedgwick.*
Solicitors for the Defendants: Messrs. *R. & C. H. Hodgson.*

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION.

PAYNE'S CASE.

Company—Transfer of Shares—Power of Directors to decline to register Transfer—Wilful Misrepresentation.

On the day prior to the stoppage of a limited company, a transfer of shares was executed by *P.* to *L.* for the stated consideration of £17, *L.* being described as a "gentleman." The transfer was sent by *P.'s* broker to the office of the company, where it was registered, and *L.'s* name was inserted on the register of members. Shortly afterwards, a voluntary winding-up was resolved upon, which was afterwards ordered to be continued under supervision. Three years afterwards the liquidators discovered that *L.*, at the date of the transfer, was a clerk with a salary of 25*s.* a week in the same

(1) Law Rep. 3 Ch. 429.

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PAYNE'S CASE.

office as *P.*, and that the real consideration was, not £17 paid by *L.* to *P.*, but £5 paid by *P.* to *L.* to induce him to execute the deed.

It was admitted that the transfer was out and out; and the directors had power to decline to register any transfer if they did not approve of the transferee:—

Held, that the name of *L.* must be removed from the register of members and list of contributories, and that of *P.* substituted.

6 Ex 153.
WM 1871/186
7 Ch 299, 300
295 n(c)

THIS was an application by summons on behalf of the liquidators of the *Imperial Mercantile Credit Association, Limited*, that the register of members of the company might be rectified by striking out the name of "*Thomas Lovell*, of 10, *China Walk, Lambeth Road*, gentleman," as a member in respect of sixty-eight shares, and inserting the name of "*William Payne* of *Guildhall, London*, gentleman," in respect of the same shares; and that the list of contributories might be amended accordingly.

By a transfer deed, dated the 10th of May, 1866, sixty-eight shares in the company were purported to be assigned, in consideration of £17, by *William Payne*, described as above, to *Thomas Lovell*, described as above.

The deed was sent to the office of the company, where the transfer was registered, and the name of *Lovell*, by the above description, inserted in the list of members.

By the 11th of the articles of association of the company it was provided as follows:—

"The directors may decline to register any transfer of shares made by a member who is indebted to the company on any account whatever, either alone or jointly with any other person, or if the transferee is not approved of by the directors."

On the 11th of May, 1866, the company stopped payment; and on the 12th a Petition was presented to wind it up. At extraordinary general meetings held on the 28th of May, and the 14th of June, it was resolved to wind up voluntarily; and on the 26th of June, 1866, an order was made to continue the liquidation under supervision.

In July, 1866, the liquidators proceeded to settle the list of contributories, and *Lovell's* name was inserted.

In the year 1869 *Lovell* became bankrupt, and in the course of an examination in the bankruptcy, held on the 13th of October,

certain statements were made which induced the liquidators to summon *Lovell* and *Payne* to give evidence as to the transfer of the 11th of May.

On the 10th of November it appeared, from *Lovell's* and *Payne's* depositions, that *Lovell*, in May, 1866, was a messenger in the office of the Chamberlain of *London*, at a salary of 25*s.* a week. He did not pay £17 as a consideration for the transfer. *Payne* was in the same office, and knew of *Lovell's* position. The real consideration was a £5 note, which *Payne* paid to *Lovell* to execute the deed. *Payne* brought the deed to *Lovell*, and he signed it.

Payne said that a Mr. *Scott* acted as his broker in the matter, and he believed *Scott* filled up the transfer. He believed *Lovell's* address was correct. He transferred the shares out and out to *Lovell* to get rid of his responsibility.

Mr. *Kay*, Q.C., and Mr. *Lindley*, for the liquidators:—

The case is completely governed by *Williams' Case* in this company (1).

(1) 1869. July 21. V.-C. J.

WILLIAMS' CASE.

ON the 10th of May, 1866, twenty shares were transferred, nominally in consideration of £45, by *Williams* to *Wiles*, who was described as "of *Blenheim Terrace*, in the city of *Bristol*, public accountant." The transfer was registered, and *Wiles'* name was inserted on the register.

The liquidators found, upon applying for payment of calls, that *Wiles* was a clerk in *Williams'* employ at 23*s.* a week, and that no consideration had been paid for the transfer.

It was alleged by *Wiles* that the shares were an out and out gift to him.

Mr. *Kay*, Q.C., and Mr. *Lindley*, for the liquidators, cited *Ex parte Parker* (Law Rep. 2 Ch. 685); *Budd's Case* (3 D. F. & J. 297); *Slater's Case* (35 Beav. 391); *Alexander's Case* (9 W. R. 410).

Mr. *Amphlett*, Q.C., and Mr. *Chitty*, for *Williams*, cited *Weston's Case* (Law Rep. 4 Ch. 20).

SIR W. M. JAMES, V.C.:—

In this case the directors had power to refuse to transfer, if they did not approve of the transferee. If the truth had been told them it would have been their duty to exercise the power and refuse the transfer. If on the face of the transfer it had been stated that there was no consideration, that the shares were transferred merely by way of gift to the transferee, and if the transferee's proper description had been given, as the clerk of the broker engaged in the transaction, it would have been the directors' duty (and I must assume they would have done their duty) to refuse the transfer. I am of opinion that the misdescription was designed, and that the market value of £45 was put in, and a description apparently of a man of some position was put into the deed for the purpose of

V.-C. J. 1869 PAYNE'S CASE.

Mr. *Fry*, Q.C., and Mr. *Cracknall*, for Mr. *Payne*:—

An out and out transfer, even to a man of straw, is perfectly good. The description of a clerk as a gentleman is not inappropriate.

SIR W. M. JAMES, V.C.:—

My opinion is, that in principle, this case is entirely governed by my own decision in *Williams' Case*, every word of which I now repeat. In this, I am following also *Kintrea's Case* (1), in which Lord Justice *Giffard* used almost the same words which I had used in *Williams' Case*.

Here, there was a mis-statement, which was intended to mislead the directors, and which did mislead them; and I cannot imagine that it makes any difference whether the falsehood came from *Payne* or from the broker.

The application must be granted, and Mr. *Payne* must pay the costs of the adjournment into Court.

Solicitors for the Applicants: Messrs. *Ashurst, Morris, & Co.*
Solicitors for Mr. *Payne*: Messrs. *Shepherd & Son.*

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deceiving the directors, and by that deceit obtaining their assent to the transfer. That falsehood vitiates the whole of the transaction.

If it be said that I have no evidence that the falsehood was successful, that it is possible, and, from what took place in another case, probable, that if the falsehood had not been told the directors still would have done what they did, I do not think a Court of Equity is in the habit of considering that a falsehood is not to be looked at because if the truth had been told the same thing might have resulted.

In this case it was told, as all falsehoods are told, for the purpose of deception. The directors were deceived, and they have a right to say we will have the transaction set aside.

(1) Law Rep. 5 Ch. 95.

SILVER *v.* UDALL.

V.-C. J.
1869
Dec. 9.

Partition Suit—Partition Act, 1868 (31 & 32 *Vict. c.* 40)—*Sale—Parties out of Jurisdiction.*

The Court has jurisdiction to direct an immediate sale in a partition suit in the absence of parties interested in the property, but shewn to be out of the jurisdiction. But where it was uncertain whether such absent parties were or were not within the jurisdiction, an inquiry was directed as to the persons interested in the property and their shares therein, and whether such persons were out of the jurisdiction.

THIS was a suit for the purpose of having the trusts of a marriage settlement, so far as regarded certain leasehold property held for short terms, carried into execution, and the bill prayed a sale under the *Partition Act*, 1868.

By the terms of the settlement the property had become divisible among the children of the marriage in tenths. The late husband of the Plaintiff, as one of such children, was entitled to one-tenth, and the Plaintiff, who was executrix of her husband, had filed the bill against the Defendants, *J. Udall* and *E. D. Silver*, the trustees of the settlement. The Defendant *Silver*, in addition to his own tenth, had acquired, by purchase, six-tenths from the persons entitled thereto. Of the persons entitled to the remaining two-tenths, one was not known, and the other was stated to be in *New Zealand*.

The Defendant *Silver* resisted a sale, and had refused to purchase the Plaintiff's share at a valuation, as provided by sect. 5 of the *Partition Act*, 1868.

Mr. *Hinde Palmer*, Q.C., and Mr. *Crossley*, for the Plaintiff, asked for an immediate sale under sect. 3.

Mr. *Kay*, Q.C., and Mr. *W. P. Dickens*, for the Defendant, contended that the Court could not direct a sale in the absence of the persons entitled to the remaining two-tenths. All that could now be done was to direct inquiries under sect. 9, with a view to an order for partition or sale being made on further consideration.

Mr. *W. R. Ellis, amicus curiæ*, mentioned an unreported case of

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Silver v. *Frost*, relating to other property comprised in the same settlement, where the Master of the Rolls made an immediate decree for a sale without waiting for the further consideration of the cause.

SIR W. M. JAMES, V.C., said that if the persons entitled to the remaining two-tenths had been proved to be abroad, he should have made an immediate decree for a sale, but as there was no evidence to shew that they were not within the jurisdiction, all he could do now was to direct an inquiry as to who were interested in the property besides the Plaintiff and Defendant, and in what shares, and whether they were out of the jurisdiction.

An account must be taken of what was due to Plaintiff from Defendant in respect of her one-tenth in the property, reserving further consideration.

Solicitors: Mr. *J. A. Stuart;* Messrs. *Phelps & Bennett.*

V.-C. J. 1870 *Jan.* 17.

SYKES *v.* DYSON.

Practice—Sequestration—Debtors Act, 1869 (32 & 33 *Vict. c.* 62).

Writ of sequestration issued against the property of a personal representative, who was in default for non-compliance with an order for payment of money, without attachment of his person.

IN this, which was an administration suit, the Defendant *Dyson* was, by order of the 9th of December, 1869, directed to pay, on or before the 31st of December, the sum of £470, found by the Chief Clerk's certificate to be due to the estate from the Defendant as personal representative.

The order served upon the Defendant contained the usual notice that in default of payment he would be attached, and a writ of sequestration obtained against his property.

Default was made, and on application to the Record and Writ Clerks they had declined to draw up any order until the practice under the *Debtors Act*, 1869 (32 & 33 Vict. c. 62) should have been settled by a General Order.

Mr. *F. J. Wood* mentioned the point to the Court, and after referring to 32 & 33 Vict. c. 62, ss. 4, 8 (1), said that if the Court should be of opinion that the writ of sequestration could issue without first attaching the person of the Defendant he would be contented to take the order in that form.

The VICE-CHANCELLOR said that the Defendant was a debtor, and, following sect. 8, directed the writ of sequestration to be issued as if he had been actually arrested.

Solicitors: Messrs. *Bell, Brodrick, & Gray.*

TRAPPES *v.* MEREDITH.

Bankruptcy—Annulment—Forfeiture—Practice—Amendment at hearing.

A clause of forfeiture of an annuity on bankruptcy or alienation does not operate where the bankruptcy is annulled before the first payment becomes due.

Subject to the life interest of *X.* therein, property was devised to trustees, upon trust thereout to pay an annuity of £100 to *A.* (husband of the testatrix) during his life, with a declaration that if *A.* should become bankrupt, or should assign, charge, or incumber, or suffer any act whereby the same or any part thereof would, if belonging absolutely to him, become vested in any other person or persons, then the said annuity should not be payable, or should cease to be payable, in the same manner as if *A.* were dead.

X. survived the testatrix, and died on the 4th of April, 1868.

In January, 1868, *A.* was adjudicated bankrupt on his own petition, and on the 21st of July, 1868, an order was made on his own application, with the consent of his creditors, annulling the adjudication in bankruptcy:—

Held, that as the bankruptcy was annulled before the first payment under the annuity fell due (April 4, 1869), the clause of forfeiture did not operate.

MRS. *GRAHAM*, having a power of appointment over certain trust property, subject to the life interest therein of her mother,

(1) Sect. 4. "With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money:"

Exc. 3. "Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control."

Sect. 8. "Sequestration against the property of a debtor may, after the commencement of this Act, be issued by any Court of Equity in the same manner as if such debtor had been actually arrested."

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Anna Maria Payne, by her will, dated the 16th of February, 1863, made in execution of her testamentary power of appointment, appointed the property upon trust, after payment of debts and certain legacies, to pay out of the income of the remainder of the trust property, and if insufficient out of the capital, to her husband, the Defendant, *Henry C. T. Graham,* an annuity of £100 during his life; but with a declaration that if her said husband should become bankrupt, or should assign, charge, or incumber, or suffer any act whereby the same or any part thereof would, if belonging absolutely to him, become vested in any other person or persons, then and in such case the said annuity should not be payable, or should cease to be payable, as the case might require, in the same manner as if her said husband were dead; with a further declaration that it should be lawful for her trustees in their discretion, and without assigning any reason for so doing, at any time to refuse or discontinue payment of the annuity to her husband during the whole or any portion of his life. After satisfying the above purposes the trustees were to hold the remainder of the trust property upon trust as Mrs. *Trappes* (a sister of the testatrix) should by deed or will appoint, and in default of and subject to any such appointment as last aforesaid, for the use and benefit of the children of Mrs. *Trappes* equally.

By a codicil, dated the 24th of May, 1864, the amount of the annuity was increased to £150.

On the 21st of June, 1864, Mrs. *Graham* died.

On the 16th of January, 1868, *H. C. T. Graham* was duly adjudged a bankrupt upon his own petition, and a creditors' assignee was appointed.

On the 4th of April, 1868, Mrs. *Payne,* the tenant for life of the trust property, died.

On the 21st of July, 1868, an order was made by the Court of Bankruptcy, upon the bankrupt's own petition, with the consent of the creditors, annulling the adjudication in bankruptcy.

The principal question in the present suit, which was filed for the purpose of administering the trust property, was whether the annuity given by the will of Mrs. *Graham* became forfeited by the bankruptcy of *H. C. T. Graham.*

It was alleged in one of the answers, and in affidavits filed on

behalf of the Plaintiffs (though not stated in the bill), that on the 7th of May, 1861, *Graham* was upon his own petition adjudged bankrupt under a Scotch sequestration, and that on the 29th of August, 1868, he was discharged of all debts and liabilities contracted by him, or for which he was liable at the date of the sequestration.

Mr. *Willcock*, Q.C., and Mr. *Townsend*, for the Plaintiffs.

Mr. *Bristowe*, Q.C., and Mr. *Chapman Barber*, for the trustees.

Mr. *Kay*, Q.C., and Mr. *Bradford*, for the Defendant *Graham*, contended that by the annulment of the bankruptcy before anything became payable under the annuity, *Graham* had always been in a position to receive it from the time that it became receivable, and the act of forfeiture never occurred: *White* v. *Chitty* (1); *Lloyd* v. *Lloyd* (2).

Mr. *De Gex*, Q.C., and Mr. *Pontifex*, for persons interested in remainder:—

The annulment of an adjudication does not operate retrospectively, so as to put the bankrupt and his estate in precisely the same situation as if no commission had been issued, when the annulment is not in consequence of any impropriety in the original adjudication: *Smallcombe* v. *Olivier* (3) (in which Lord *Eldon's* decisions were reviewed and overruled); *Allen* v. *Coster* (4). *White* v. *Chitty* is distinguishable, as there the bankrupt was in actual possession of the property, and before any rents were received, or the assignees had interfered to realize the property, the bankruptcy was annulled. So also is *Lloyd* v. *Lloyd*, where there was no clause of forfeiture upon bankruptcy, and the annulment was held to have been "in time to intercept the property before it passed into other hands than those of the legatee." Here, as in *Cox* v. *Fonblanque* (5), the gift was only made provided the donee was not a bankrupt;—"that was a condition precedent annexed to the gift; he was a bankrupt, he did not fulfil the condition, con-

(1) Law Rep. 1 Eq. 372. (3) 13 M. & W. 77.
(2) Ibid. 2 Eq. 722. (4) 1 Beav. 274.
(5) Law Rep. 6 Eq. 482.

V.-C. J. 1869 TRAPPES v. MEREDITH.

sequently there was no gift." Moreover in this case the property never came into the hands of the assignees; it was vested in trustees, and as, upon the death of the tenant for life, when the title of *Graham* accrued, he was incapacitated from taking by his bankruptcy, the clause of forfeiture accrued, and the trustees held it for those who were entitled in remainder.

SIR W. M. JAMES, V.C.:—

12 L.D. 155

I do not say anything about the Scotch sequestration, for I know nothing about it. With regard to the effect of the bankruptcy obtained on *Graham's* own petition, and annulled on his own application, with the consent of his creditors, I quite agree with Mr. *De Gex* that it is not right or becoming for the Court to find minute points of difference—hair splittings—between this case and adjudged cases; and I mean to decide it according to what I think the good sense of the cases requires me to do.

Taking the whole of the cases together, those which establish that there was, and those which establish that there was not a forfeiture, they all proceed upon this one broad principle, that the general intent of a gift of this kind is, that it is to be for the personal enjoyment of the legatee, and if that personal enjoyment is not to be had by reason of the bankruptcy, alienation, or any other act or omission by which the property would be vested in any other person or persons, then the forfeiture takes effect; but if not, it does not take effect. The question here to be tried is, what was the position of things at the time when the first payment of the annuity had become payable. The annuity would not have become payable until the 4th of April, 1869. The tenant for life died on the 4th of April, 1868. At that time the annuitant was a bankrupt, adjudged bankrupt on his own petition, and if that state of things had continued, then even where the words are words of futurity, the cases apply, and it would have been said: "You are a bankrupt; you cannot receive this annuity; the right to receive it is vested in somebody else, and your right is gone." But possibly, from this very fact of the tenant for life's death, the annuitant was induced to exert himself, and set himself to get rid of his bankruptcy. He does get rid of it absolutely as between the assignees and himself and his creditors; and before any pay-

ment becomes due, before any part of the annuity is payable, he ceased to be in that condition which alone would be the cause of forfeiture. That being so, I am of opinion that the annulment of the bankruptcy has this effect, as mentioned by Vice-Chancellor *Wood* in *White* v. *Chitty* (1), and *Lloyd* v. *Lloyd* (2)—you take the adjudication and annulment together, and the result is, that this can be done without prejudicing or affecting any of the rights which have arisen from the acts of the assignees, and the whole matter is to be restored to the state in which it was at the time of the adjudication of bankruptcy. Before the forfeiture would take place, the forfeiture was gone; the man had ceased to be a bankrupt within the meaning of this provision, and the forfeiture clause is not operative.

[With regard to the Scotch sequestration, leave was given to amend the bill by stating the Scotch sequestration. Evidence to be gone into on both sides on such allegation as if upon motion for decree.]

Solicitors: Mr. *Southee;* Messrs. *Rooks, Kenrick, & Harston;* Messrs. *Meredith & Lucas.*

In re RAPHAEL'S TRUST ESTATE.

Bankruptcy—Suspension of Proceedings—Bankruptcy Act, 1861, *s.* 110—*Death of Trustee—Appointment by Court of Chancery of New Trustee—Trustee Acts.*

Where proceedings in a bankruptcy have been suspended by a resolution of the creditors, passed under sect. 110 of the *Bankruptcy Act*, 1861, and the trustee appointed by the creditors to wind up the estate and effects of the bankrupt has died, the Court of Chancery has jurisdiction, under the Trustee Acts, to appoint new trustees.

THIS was an unopposed Petition, presented by *Alexander B. Bremner*, on behalf of himself and all other the creditors of *Henry Raphael*, a bankrupt, praying that *William Thomas Till* (the son), or some other fit and proper person, might be appointed to be the

(1) Law Rep. 1 Eq. 372. (2) Law Rep, 2 Eq. 722.

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trustee of the estate and effects of the bankrupt in the place of *William Thomas Till* (the father), deceased, and that the estate and effects of the bankrupt remaining undisposed of, and which were vested in the said *William Thomas Till* (the father), deceased, at the time of his death as such trustee, and not being a *chose in action*, might, by order of this Court, be vested in the said *William Thomas Till* (the son), and that the right to sue for and recover any *chose in action*, subject to the trusts of a resolution below mentioned, or any interest in respect thereof, might be vested in *William Thomas Till* (the son) as such new trustee.

H. Raphael was adjudicated a bankrupt on the 4th of July, 1864; and *William Thomas Till* (the father) was appointed creditors' assignee.

On the 16th of July, 1864, the creditors held a meeting under the 110th section of the *Bankruptcy Act*, 1861, which was adjourned to the 9th of August following. On that day a resolution was passed by a statutory majority under the above section that the proceedings in bankruptcy should be suspended, and that the estate and effects of the bankrupt should be wound up and administered by *William Thomas Till* (the father) in like manner as if the same had remained in bankruptcy, so far as the difference in the mode of administration would admit.

In June, 1865, a dividend of 3*s.* in the pound was paid.

On the 14th of April, 1869, *W. T. Till* (the father) died; and administration to his estate and effects was taken out by *W. T. Till* (the son).

The estate had not yet been fully administered.

Mr. *Speed*, for the Petitioner:—

The only question is as to the jurisdiction of the Court.

This case is not quite that of *In re Price's Trust Deed* (1); because in this case there never was a trust deed, a circumstance which is more favourable to the existence of the jurisdiction. Where a deed has been executed, the trustees, by sect. 197, are to have the same powers as creditors' assignees under a bankruptcy; and yet the Court of Bankruptcy has no power to appoint new trustees. Where there is not, and never has been, a trust deed, the powers

(1) Law Rep. 6 Eq. 460.

of the Court of Bankruptcy must be at least not greater than they are where there is.

The effect of suspension is to take the affairs out of bankruptcy altogether, although the bankrupt has still (sect. 110) to come back to the Court for his order of discharge.

SIR W. M. JAMES, V.C.:—

I think I may make this order.

It seems to me that the case is in effect the same as that of *In re Price's Trust Deed* (1).

The order will be to appoint *William Thomas Till* to be trustee in the terms of the prayer of the Petition.

Solicitors: Messrs. *Kiss & Son.*

(1) Law Rep. 6 Eq. 460.

1869
Nov. 11.

In re ASIATIC BANKING CORPORATION. *Ex parte* COLLUM.

Company—Provisional Certificates—Liability to take Shares—Forfeiture.

C. applied for and was allotted shares in a banking company, paid the first instalment in the usual way, and received provisional certificates, which, on payment of the second instalment, and on executing the deed by a given day, were to be exchanged for shares, but in default of payment the rights and privileges appurtenant to the certificate were to be forfeited. He failed to pay the second instalment and to exchange his certificates. The company passed into liquidation:—

Held, that he was under no obligation to take shares, and that his interest was forfeited, and that he was therefore not liable to be placed on the list of contributories.

THIS was an adjourned summons to remove the name of Dr. *Collum* from the list of contributories of the *Asiatic Banking Corporation* in respect of ten shares.

The company was established under a royal charter, dated the 10th of February, 1864, and by a deed of settlement of the 11th of April, 1864. The original capital consisted of £500,000, divided into 25,000 shares of £20 each.

On the 25th of January, 1865, the court of directors, having previously obtained the consent of the Treasury, passed resolutions to increase the capital of the company from £500,000 to £1,000,000, by the creation of 25,000 new shares of £20 each, 12,500 at par to the proprietors of the bank, and 12,500 at £15 per cent. premium to the public. A prospectus was accordingly published which stated the terms of the issue as follows:—

	£	s.			
On allotment	2	10	on account of	capital.	
	7	10	„	„	premium.
On the 30th of June, 1865 .	2	10	„	„	capital.
	7	10	„	„	premium.
On the 31st of December, 1865	5	0	„	„	capital.

On the 25th of January, 1865, the board also issued a circular containing a form of application.

On the 27th of January, 1865, Dr. *Collum*, who had not held

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any original shares, but had seen the prospectus, applied on one of the printed forms for 100 new shares. On the 10th of February, 1865, the acting manager wrote to Dr. *Collum* stating that the directors had allotted him thirty-five shares, and requesting the payment of £350, being £2 10*s.* per share of capital and £7 10*s.* per share of premium. At the foot of the letter was affixed this statement—"This sheet to be presented entire to the bankers, who will sign the receipt annexed, and must be retained by the allottee until exchanged for the usual certificate." On the 15th of February, 1865, Dr. *Collum* paid the sum of £350, and received a receipt from the bank. The directors caused to be prepared provisional certificates, and thirty-five of them were issued to Messrs. *Sandeman & Dobree*, of 2, *Royal Exchange Buildings*, on behalf of Dr. *Collum*, numbered 02240 to 02274, purporting to entitle the holder to be registered as a proprietor of the shares. The provisional certificate was in the following form:—

"Provisional Certificate of New Issue.

"New Share, 02240.

"*Asiatic Banking Corporation;* Incorporated by Royal Charter, 1864.

"This is to certify that the holder of this provisional certificate having paid to the *Asiatic Banking Corporation* the sum of £2 10*s.*, being the first instalment of capital, and £7 10*s.*, the first instalment of premium, in respect of new share, No. 02240, for £20, in the *Asiatic Banking Corporation*, will be entitled upon payment of the sum of £2 10*s.*, being the second instalment of capital, and £7 10*s.*, being the balance of premium in respect of the said shares, on or before the 30th of June, 1865, and on execution of the deed of accession to be prepared in respect of such new capital, to be registered as a proprietor of share No. 27240 for £20 in the new capital of the said company, having £5 paid thereon, subject to the published terms of issue, and to the regulation of the charter-deed of settlement and deed of accession thereto.

"Dated this 21st day of March, 1865.

"*J. A. Russell,*
"*Thomas Cardwell,* } Directors.

"*J. W. Lawrence,* Acting General Manager.

"Entered. *A. D. Davis,* Acting Accountant.

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"N.B.—In default of payment of the second instalment of capital and the balance of premium on or before the 30th of June, 1865, the amount paid, together with all the rights and privileges appurtenant to this certificate, will be forfeited. Holders desirous of doing so may anticipate these payments at a discount of £6 per cent. Payment may be made at *Bombay* at the rate of 2*s.* per rupee."

The other certificates were in the same form. On the 22nd of February, 1865, Dr. *Collum*, through his brokers, sold twenty-five of the certificates, which were exchanged for shares, and the names of the purchasers were duly entered on the register of the company; but he never paid the second instalment on the remaining ten shares, which was due on the 30th of June, 1865, nor executed the deed of accession or exchanged the provisional certificates for shares, according to the terms of the contract. He did not appear to have had any further communication with the company till March, 1867, when he received notice from the official liquidators (the company having been then ordered to be wound up) that his name would be placed on the list of contributories in respect of the ten shares. This summons was then taken out.

Sir *Roundell Palmer*, Q.C., Mr. *A. E. Miller*, and Mr. *Chitty*, for Dr. *Collum*:—

These certificates involved no obligation to take shares, and the holder of them could not properly be placed on the list of contributories of the company. This case is covered by authority, In the case of *Eustace* v. *Dublin Trunk Connecting Railway Company* (1) provisional scrip certificates were issued after the incorporation of the company, and it was stated in the prospectus that £1 should be paid on application and £4 on allotment, and "that on registration of the scrip, of which due notice would be given, the certificates for £50 would be divided into five shares of £10 each." In that case it was held that the holder of the scrip certificates was under no obligation to convert them into shares. In *Ormerod's Case* (2), the same principle was acted on, and a scrip-holder was held not liable to be placed on the list of contributories.

Secondly: by non-payment of the second instalment of capital

(1) Law Rep. 6 Eq. 182. (2) Law Rep. 5 Eq. 110.

and the balance of premium on or before the day fixed for payment, the certificates, and therefore the right to shares, were absolutely forfeited, and Dr. *Collum* could not after that either claim to be a shareholder or be liable to be placed on the list of contributories: *Ex parte Beresford* (1).

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the official liquidator:—

Dr. *Collum* applied in the usual way for 100 shares, and undertook to accept what should be allotted to him. There were allotted to him thirty-five shares, on which he paid £350, and agreed to pay the balance. So far there was a complete contract. But then it was said that the power given to the directors to declare a forfeiture of the shares relieved Dr. *Collum* from his obligation to perform his contract; but provisions for making void, or forfeiting rights, are not intended for the benefit of the party entering into the obligation, but are provisions in favour of those with whom the obligation is entered into: *Moore* v. *Rawlins* (2), *Woollaston's Case* (3). It is like the case of landlord and tenant, where the provision as to forfeiture is clearly for the benefit of the landlord and not of the tenant.

In this case the directors had undoubted power under their charter to declare a forfeiture, but they did not do so. With respect to the case of *Eustace* v. *Dublin Trunk Connecting Railway Company* (4) the contract was merely to pay a certain sum of money for the scrip, and involved no further liability, but that decision has no application to this case.

SIR JOHN STUART, V.C.:—

The rights acquired by the allottees are not absolute, but are rights which, according to the authorities, do not empower the directors to compel the holders of these provisional certificates to clothe themselves with the character of shareholders. This principle is clearly laid down in the case of *Eustace* v. *Dublin Trunk Connecting Railway Company*, which must govern the present case.

(1) 2 Mac. & G. 197.
(2) 6 C. B. (N.S.) 289.
(3) 4 De G. & J. 437.
(4) Law Rep. 6 Eq. 182.

V.-C. S. 1869 *In re* Asiatic Banking Corporation. *Ex parte* Collum.

On the second point, "as to the forfeiture, Dr. *Collum* states that he had notice of the resolution embodied in the certificate that in case of non-payment of the second instalment of capital and premiums the shares would be forfeited. Dr. *Collum*, having received these certificates, sold some of the shares allotted to him, but he neglected to pay the second instalment by the day mentioned, or at all. The consequence was that all rights and privileges appurtenant to the certificates became forfeited to the company. Upon that forfeiture Dr. *Collum* ceased to be liable in respect of such shares, and he cannot be put on the list of contributories of the company. He must have his costs, and the costs of the liquidator must come out of the estate.

Solicitors for the application: Messrs. *Rickards & Walker.*
Solicitors for the Liquidator: Messrs. *Freshfield.*

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M. R.
1869
Nov. 15, 16, 17,
1870
Jan. 14.

Right of Common—Bill on behalf of Freeholders and Copyholders of Manor—Frame of Suit—Misjoinder—Survey by Crown—Evidence.

A suit for the purpose of establishing a right of common over the wastes of a manor may be maintained by a copyhold and freehold tenant of the manor on behalf of himself and all other copyhold and freehold tenants.

A document purporting to be a survey of a manor made while it was part of the possessions of the Duchy of *Cornwall*, and coming out of the proper custody, is admissible as evidence of the boundaries and customs of the manor.

10 Eq 110, -3, 118, 125, 4 Ch D. 669 17 Ch D 550 535-560 571

THIS was a suit by *Augustus Smith* on behalf of himself and all other the freehold and copyhold tenants of the manor of *Berkhamstead*. The bill prayed for a declaration that the Plaintiff and the other freehold and copyhold tenants of the manor were entitled, as to the right of pasture for commonable cattle as appendant, and as to all other commonable rights as appurtenant, to their freehold and copyhold tenements, to the following common rights, viz., a right of common of pasture upon *Berkhamstead Common*, and four pieces of waste within the manor, for all sorts of cattle levant and and couchant, as well commonable as others, and a right of estovers, and heybote, and woodbote, and to cut so much furze, gorse, fern, and underwood upon the said common, and so much of the said four pieces of waste as now remains uninclosed, as may be required for the purpose of fodder and litter for cattle, as well commonable as others, levant and couchant, on the said tenements, and for fuel and other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of the said tenements, and a right to use the whole of the said common for walking, driving, and riding on horseback, and for the enjoyment of air and exercise, and for amusement and recreation, and other rights, privileges, and customs; and for an injunction to restrain the Defendant, the lord of the manor, from inclosing any part of the said common and four pieces of waste, and from disturbing and interfering with any of the rights of the Plaintiff and the other freehold and copyhold tenants of the manor in and over the common, or interrupting their free ingress thereto or egress therefrom.

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It appeared that the honour of *Berkhamstead* was granted by a Charter (1) of 11 *Edward* III. to *Edward* Prince of *Wales* on his creation as Duke of *Cornwall*, and was afterwards held and enjoyed as part of the possessions of the Duchy of *Cornwall* down to the year 1860, with the exception of the period during the Commonwealth when they were held by or under certain commissioners or trustees of the "honours, manors, and lands theretofore belonging to the then late King, Queen, and Prince." In 1860 certain hereditaments, parcel of the honour of *Berkhamstead*, were purchased from the Duchy of *Cornwall* by the trustees of the late Earl *Brownlow*, and were conveyed to such trustees by an indenture of the 19th of May, 1862, and subsequently became vested in the late Earl in fee simple, subject to a mortgage. This purchase included certain hereditaments described in the conveyance as "the manor or lordship of *Berkhamstead St. Peter*, and the manor or hallimote of *Berkhamstead St. Mary* otherwise *Northchurch*, in the county of *Herts*." The Plaintiff alleged that the manor of *Berkhamstead St. Peter*, and the manor of *Berkhamstead St. Mary*, otherwise *Northchurch*, although *ex majori cautelâ* described as separate manors, formed in reality but one manor of *Berkhamstead*, including freehold and copyhold lands in the parish of *Berkhamstead St. Mary* or *Northchurch*, as well as in the parish usually called *Berkhamstead*, or *Berkhamstead St. Peter*. The Defendant, on the other hand, insisted that the manor or borough of *Berkhamstead*, and the manor or hallimote of *Northchurch*, were two separate and distinct manors, with separate and distinct courts; and that the manor of *Berkhamstead* included lands in the parish of *Berkhamstead* or *Berkhamstead St. Peter* only, and the manor of *Northchurch* included lands in the parish of *Northchurch* only; but he admitted that both such manors, as well as the manor of *Swanborne* in *Bucks*, the manor of *Blaxley* in *Northamptonshire*, and the manor of *Aldbury* in *Herts*, and other manors, formed parcel of the honour of *Berkhamstead*. He also admitted that the Plaintiff was entitled to freehold and copyhold lands situate in both parishes. It was also

(1) This charter is set out in *Latin* in the Lords' Report on the Dignity of a Peer; and in *English* in *The Prince's Case* (8 Rep. 8 a, and also in 3 M. & R. 474).

admitted, with respect to the freehold and copyhold lands of the Plaintiff, that they were held of the manor within which they respectively were situated. Quit rents had been paid in modern times in respect of the Plaintiffs' freehold lands. The Defendant did not admit that any landowner was a freehold tenant of the manor or manors in question, except those landowners (comparatively few in number) in respect of whose freehold lands quit rents had been paid in recent times.

Berkhamstead Common, or *Frith*, over which the rights in question were claimed, is in shape somewhat similar to a horse-shoe. Previously to 1618 it included about 1270 acres. In that year a part of it, including 300 acres, was, with the consent of the tenants of the manor, inclosed by the then Prince of *Wales*, and taken into his park, which adjoined the common. In 1639, 400 acres more were inclosed, and actually leased to a tenant; but this inclosure was vigorously opposed by the tenants; and in August, 1640, the fence which surrounded it was thrown down by one *William Edlyn* of *Northchurch*, and others. Thereupon the Commissioners of the Revenues of the Prince of *Wales* presented a petition to the Lords of Parliament complaining of this act; and on the 6th of April, 1641, the House of Lords, after hearing counsel both for the Petitioners and for *William Edlyn* and *John Edlyn*, his brother, ordered that the Prince (he being a member of the said House) should quietly and peaceably enjoy the improved lands during the continuance of that Parliament and the privilege of the same; and the House, although fully satisfied that *William Edlyn* and *John Edlyn* were delinquents, was pleased to remit their offence; yet so that if they or any others should again, during the time aforesaid, offend, they should be severely punished; and it was not their Lordships' pleasure to determine anything in point of right to the title, but after the time of privilege of Parliament to leave it to the determination of the law. Notwithstanding this order, the opposition appeared to have been continued by the tenants. In 1651 the honour and manor of *Berkhamstead* were sold and conveyed to *Godfrey Ellis* and *Griffantius Phillips*. Towards the end of 1653 (O. S.) *Ellis* exposed for sale the 400 acres inclosed in 1639. On the 9th of February, 1653, *John Edlyn* presented a petition to certain commissioners for removing obstructions in the

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sale of the honours of the late King, Queen, and Prince, praying that *Ellis* might make out the State's title; and it was on the same day ordered that, upon security to be given by *Ellis* for the payment of all discharges which the Commonwealth or the parties concerned should be at in case he failed to make good his discovery, it should be referred to the counsel for the Commonwealth to peruse such evidences, writings, and proofs, as should be produced by the discoverer and the petitioners touching their interests claimed in the premises, and to state matter of fact, and certify the same forthwith. *Ellis* failed to give security; and on the 27th of April, 1654, it was ordered that, inasmuch as *Ellis* had not made out any title in the Commonwealth to the common in question, the said cause between the Commonwealth (upon the pdiscovery of *Ellis*) and *John Edlyn* and others concerning the right of common in the frith called *Berkhamstead Frith* should be dismissed, and that the Petitioners should be awarded costs against *Ellis*.

No further encroachment was attempted until February, 1866, when the late Earl *Brownlow* caused 500 acres, part of the common, and including the 400 acres proposed to be included in 1639, to be inclosed. This was effected by the erection of two strong fences, both of which were carried from one boundary of the common to the other, so that a space in the middle of the common was completely shut in between the fences and the boundaries of the common; while a portion at each end of the common was left uninclosed. On the 6th of March, 1866, these fences were removed by persons acting under the authority of the Plaintiff. On the 9th of March, 1866, the late Earl *Brownlow* commenced an action of trespass against the Plaintiff. On the 31st of July, 1866, the Plaintiff filed the bill in this suit against the late Earl. Upon his death in 1867, the Plaintiff revived the suit against the present Earl, who succeeded the late Earl in his title and estates. The action at law was not proceeded with after the death of the late Earl. The suit now came on to be heard.

The Plaintiff, in support of his case, both as to the extent and the customs of the manor, tendered in evidence a document which had formerly been in the office of the Duchy of *Cornwall*, but was then in the custody of the Defendant, having been delivered to the

trustees of the late Earl *Brownlow* on the completion of the purchase made by them in 1860. This document purported to be the verdict and answers of a jury, consisting of tenants of the manor, to certain articles given in charge at a Court of Survey for the honour and manor of *Berkhamstead*, holden on the 20th of July, 1607, before Sir *John Dodderidge*, serjeant-at-law, and others. The document was signed by the jurors, but the commission under which the survey was held was not produced; and the admissibility of this document as evidence was contested by the Defendant. A similar Court was held in 1616; and office copies from the Duchy of Cornwall office of the articles of inquiry, and answers, were tendered in evidence, the originals not being forthcoming. The latter survey is known as Norden's survey, and was stated in the argument (and not disputed) to have been admitted in evidence in *Earl Beauchamp* v. *Winn* (1).

The nature and effect of the evidence are stated at some length in the judgment; and for the purposes of this report it is considered unnecessary to go into further detail.

Sir *Roundell Palmer*, Q.C., Mr. *Joshua Williams*, Q.C., and Mr. *A. P. Whately*, for the Plaintiff:—

The lord of the manor has made an inclosure, which he will probably attempt to justify under the *Statute of Merton* (20 Hen. 3, c. 4). But an approvement under that statute is only good where sufficient pasture is left for the tenements entitled to common, and there is free egress and regress from the tenements to the pasture. The question then arises on whom lies the burden of proof that the requirements of the statute have been complied with. We contend that the burden of proof lies with the lord.

The customs of a manor are said to have arisen out of a contract between the lord and his tenants: *Marquis of Salisbury* v. *Gladstone* (2). The original contract was that the tenants should have pasture over the whole common. Then came the statute enabling the lord to derogate, as it were, from his own grant; and in exercising a statutory power it is for the lord to shew that the conditions of that power have been complied with, and, therefore, to shew that he has left sufficient common for his tenants. The old

(1) Law Rep. 2 Ch. 562. (2) 9 H. L. C. 692.

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authorities for this position will be found collected in *Viner's* Abridgement (1). In pleading at common law the lord must aver that he has left sufficient common for his tenants: *Arlett* v. *Ellis* (2); *Rogers* v. *Wynne* (3). The case of *Filewood* v. *Palmer* (4) is sometimes referred to as shewing that the burden of proof lies on the tenant, but that related to a wholly different matter, the object of the suit being to restrain the lord from digging clay in the wastes of the manor. The lord's grant never excluded his property in the soil or a concurrent right of enjoyment with the tenants: *Wakefield* v. *Duke of Buccleugh* (5). We admit, for example, that if the lord fed his own beasts on the common, and the tenants objected that he fed too many, the burden of proof would lie with them: *Mellor* v. *Spateman* (6). The rule is, that in case of surcharge the burden of proof is with the tenant; in cases of subtraction, with the lord. Further, by the Statute of *Westminster* the 2nd (13 Edw. 1, c. 46), the lord is bound to leave sufficient pasture not only for his tenants, but for neighbours having a right. The documentary evidence produced by the Plaintiff shews that in this case there are or may be neighbours having rights of common, and though the Plaintiff only sues on behalf of the tenants, yet in considering the question of sufficiency the Court will not leave these rights of neighbours out of consideration, for it is obvious that every sheep put on the common by a stranger must diminish the pasture for the tenants.

If, then, the burden of proof lies on the lord, the right of the Plaintiff to a decree is clear, for the Defendant has not adduced a tittle of evidence on this point. If, however, the burden of proof lies in the first instance on the Plaintiff, we say that he has established a case which requires to be rebutted by evidence on the part of the Defendant. The transactions of the 17th century with reference to this common shew that at that time the lord had entirely exhausted his rights under the *Statute of Merton*: and it is for him to shew how he can justify at the present time a larger encroachment than was attempted then. That the Defendant has

(1) Vol. v. p. 5, tit. "Common," Ad. pl. 8, 9, 10.
(2) 7 B. & C. 346.
(3) 7 D. & R. 521.
(4) Mosely, 169.
(5) Law Rep. 4 Eq. 613.
(6) 1 Wms. Saund. 346, note (g).

not attempted to do. Again, the Defendant has completely enclosed a portion of the common in such a way as to sever completely the uninclosed portions: how then can there be free egress and regress from tenements at one end of the common to pasture at the other end?

Moreover, the lord can only justify his encroachment under the *Statute of Merton* so far as relates to common of pasture: but he cannot under that statute interfere with other rights, such as the right of cutting furze, which has in this case been immemorially exercised over the whole common.

It is suggested that the rights of many owners of freehold land formerly held of the manor have been destroyed, because no quit rents are now payable; but *Earl of Chichester* v. *Hall* (1) is an express decision to the contrary.

It appears from *Dodderidge's* survey that there were, even at that period, many freehold tenants of this manor who paid to the lord no quit rents at all, and many others who paid only nominal quit rents, such as a gilly-flower, payable whenever a queen was crowned at *Berkhamstead*.

As to the admissibility of *Dodderidge's* survey as evidence; it is offered as evidence of reputation; it comes from the proper custody, and bears internal evidence of authority, and is consequently admissible: *Rowe* v. *Brenton* (2). The case of *Evans* v. *Taylor* (3) may be cited on the other side; but there the document was tendered as evidence of the boundary of the manor against a stranger to the manor; here it is tendered as evidence between the lord and his tenants of their rights *inter se*. Further, doubt has been thrown on that case in so far as it decides that such a document is not good evidence of reputation: *Duke of Beaufort* v. *Smith* (4); *Daniel* v. *Wilkin* (5). It is objected that the commission on which it was founded is not produced; but the survey follows the requirements of the Statute *Extenta Manerii* (4 Edw 1, st. 1, *Ruffhead*), and it has always been held that surveys made under that statute of lands belonging to the Crown or the Duchy of *Cornwall* are admissible in evidence. [*Attorney-General* v. *Lord*

(1) 17 L. T. 121.
(2) 8 B. & C. 737, 747; 3 M. & R. 267.
(3) 7 A. & E. 617.
(4) 4 Ex. 450.
(5) 7 Ibid., 429.

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Hotham (1), and *Freeman* v. *Read* (2), were referred to on this point.]

Sir *R. Baggallay*, Q.C., Mr. *Charles Hall*, and Mr. *Darby*, for the Defendant:—

We say, in the first place, that the only rights established by the Plaintiff's evidence (such as it is) are those relating to common of pasture and cutting gorse and fern; beyond this his case wholly fails. On the other hand, we do not justify the inclosure of the late Earl as an approvement, but we say, that the Court will not grant an absolute injunction restraining the lord of the manor from inclosing, but will qualify the injunction (if granted at all) by adding such words as these, "to the detriment of existing rights."

Three kinds of evidence have been adduced to establish the right of common: viz., 1, ancient surveys; 2, the transactions of the 17th century; 3, user. As to the first, *Dodderidge's* survey is inadmissible in evidence at all. *Evans* v. *Taylor* (3); *Phillips* v. *Hudson* (4). In the latter case, Lord *Chelmsford* expressly lays it down, that a survey made for the purposes of the Crown is just the same as if it had been made by a private owner. Further, the Statute *Extenta Manerii*, under which it is alleged to have been made, does not require any inquiry to be made as to the boundaries of the manor; and therefore, even if the survey be admissible with respect to other matters, it cannot be received as evidence on the question of boundary. *Norden's* survey, being only a copy, is still less admissible. As to the transactions of the 17th century, they amount to no more than this: that in 1618 an approvement was properly and validly carried out, and then that a further approvement was attempted, but not being proper, fell to the ground; and, certainly, there is nothing in these proceedings amounting to a decision that the lord is for ever debarred from making any further inclosure. As to the evidence of user, much of it is inadmissible, because it relates not to the manor of *Berkhamstead*, but to what we say is the distinct and independent manor of *Northchurch;* and the little that is admissible establishes a very limited right of common indeed.

(1) T. & R. 209.
(2) 4 B. & S. 174.
(3) 7 A. & E. 617.
(4) Law Rep. 2 Ch. 243.

Then, as to the frame of the suit, it is by a person who claims to be a copyholder and a freeholder on behalf of himself and all other copyholders and freeholders. We admit that one copyholder may sue in such cases on behalf of himself and all other copyholders, but we deny that a freeholder can do so on behalf of himself and all other freeholders. Every copyholder has, by the custom of the manor, the same right of common, but the rights of freeholders, being derived from the grants made to them by the lord of the manor, are, or may be different. The right of common is not an essential right to every freeholder, and there may be freeholders having no such right. For example, in this very manor, the *London and North-Western Railway Company* have bought for the purposes of their line part of the demesne lands. Yet no one would contend that the company was entitled to common in respect of such lands. A suit might, perhaps, be maintained by a person entitled to rights of common on behalf of himself and all other persons entitled to such rights; but the only decree that could be made in such a suit would be for an inquiry who were entitled to rights of common, and what was the extent of such rights. The individual nature of the freeholders' rights to common was established by the case of *Earl of Dunraven* v. *Llewellyn* (1), where the question was, whether a certain piece of land was parcel of the wastes of a manor. Evidence was offered that deceased tenants of the manor had said that it was; but the Court of Exchequer Chamber held that such evidence was inadmissible, on the ground that it is not the case that every freehold tenant of a manor has by common law a right of common, but only certain freehold tenants have such a right, and that not by common law but by virtue of their individual grants. If this be so, there is a fatal misjoinder, such as to deprive the Plaintiff of the right to amend his bill by making his bill on behalf of copyholders only; but even if the bill could be so amended, we say that the copyholders of the manor of *Berkhamstead*, properly so called, are only four or five in number; that they might have asserted their right effectually at law, and that the bill ought to be dismissed: *Phillips* v. *Hudson* (2).

(1) 15 Q. B. 791.

(2) Law Rep. 2 Ch. 243.

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Sir *Roundell Palmer*, in reply:—

The objection that there can be no bill on behalf of freeholders as a class is in this case immaterial, even if well founded; for the Plaintiff's personal capacity to sue is not denied. But the bill is in substance a bill of peace, and bills of that kind relating to rights of common have in many instances been filed in this case; see for example, *Tothill*, tit. "Common," where the old cases are collected: *Howe* v. *Tenants of Bromsgrove* (1); *Ewelme Hospital* v. *Andover* (2); *Hilton* v. *Scarborough* (3); *Weeks* v. *Staker* (4); *Arthington* v. *Fawkes* (5); *Brown* v. *Vermuden* (6). The principle on which these bills are founded is not unity of estate in the class on behalf of which they are filed; but that the persons controverting an alleged right in one individual are so numerous that it is impossible to have the question decided at law: *Mayor of York* v. *Pilkington* (7); *Lord Tenham* v. *Herbert* (8); *Hanson* v. *Gardiner* (9); thus bills have been maintained on behalf of tithe payers, each of whom has a separate interest. The very point now raised was decided in *Powell* v. *Earl of Powis* (10) on a precisely similar bill.

As to the admissibility of the evidence, Lord *Chelmsford's* remarks in *Phillips* v. *Hudson* (11) amount to nothing more than a *dictum;* and his attention was not called to the cases. Much less authentic documents than *Dodderidge's* and *Norden's* surveys have been admitted as evidence of the customs of manors, when they have been found in the custody of the lord, and kept with the Court rolls: *Denn* v. *Spray* (12); *Chapman* v. *Cowlan* (13).

Sir *R. Baggallay*, in reply on the cases cited by Sir *Roundell Palmer*:—

The cases as to bills of peace do not apply; they are bills by one man to establish his right against many; but there is no case in which a bill has been maintained by many persons claiming different

(1) 1 Vern. 22.
(2) Ibid. 266.
(3) 4 Vin. Abr. 425, pl. 35.
(4) 2 Vern. 300.
(5) Ibid. 356.
(6) 1 Ch. Ca. 272.
(7) 1 Atk. 282.
(8) 2 Ibid. 483.
(9) 7 Ves. 305.
(10) 1 Y. & J. 159.
(11) Law Rep. 2 Ch. 243.
(12) 1 T. R. 466.
(13) 13 East, 10.

rights against one. *Powell* v. *Earl of Powis* (1) was decided on demurrer, and the bill averred that the rights of all the tenants were the same as those of the Plaintiff.

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Jan. 14. LORD ROMILLY, M.R.:—

This suit is instituted by the Plaintiff on behalf of himself and all other the freehold and copyhold tenants of the manor of *Berkhamstead* to obtain a declaration that they are entitled to the right of pasture and other commonable rights in respect of their tenancy over Berkhamstead Common or Frith and four uninclosed pieces of waste of the said manor, a portion of which the late Earl *Brownlow* had attempted and had begun to inclose.

In determining this question an important point to be considered is the extent of the manor of *Berkhamstead*. A map, which purports to be a map of the extent of the manor, as alleged by the Plaintiff, is appended to the bill. The Defendant contends that this plan comprises the whole or the greater portion of two manors, viz., the manor of the borough of *Berkhamstead* and the manor of the hallimote of *Northchurch*. The property originally, and previously to the year 1600, belonged to the Duke of *Cornwall*, and seems to have originated in a grant by *Edward* III. to *Edward* Prince of *Wales* of the honour of *Berkhamstead*, which included the manor of *Swanborne* in *Bucks*, the manor of *Blaxley* in *Northamptonshire*, and the manor of *Aldbury*. It included also, according to the old grant, the borough of *Berkhamstead*, and also the manor of the hallimote of *Northchurch*, and the Defendant contends that these were two separate and distinct manors. The Plaintiff contends that these two constituted the manor of *Berkhamstead*, and that the commonable rights of the tenants of both divisions extended indiscriminately over the whole waste; and that the waste never was separated or defined as belonging partly to one and partly to the other district.

The evidence on this subject is somewhat conflicting. On the part of the Plaintiff it is shewn that there is only one book containing the Court rolls for both. On the part of the Defendant,

(1) 1 Y. & J. 159.

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in answer it is proved that though there is only one book containing the Court rolls, this book contains the Court rolls belonging to the honour of *Berkhamstead*, of which it states this manor to be parcel, and that it includes entries for the three other manors besides those in question in this cause, viz., *Aldbury*, *Blaxley*, and *Swanborne*.

The result seems to be, that from 1661 to 1790 one book contains the entries for all five manors; that from 1790 to 1862 one book contains the entries for the manor of *Berkhamstead* alone, and one book contains the entries for the hallimote of *Northchurch*, but that neither book contains any entries for the other manors.

In 1862 the property was conveyed to Earl *Brownlow* by the description of the two manors, viz., of the borough of *Berkhamstead*, and of the hallimote of *Northchurch*. In 1845, when the Plaintiff was admitted, he was admitted as a tenant of *Berkhamstead*, and subsequently as a tenant of the hallimote of *Northchurch*. And from 1790 to 1862 separate books were kept for each of the five manors constituting the honour of *Berkhamstead*.

At the same time, the evidence is very strong to shew that the manor of *Berkhamstead* comprised the whole of what is referred to as the hallimote of *Northchurch*.

In 1607 a survey was made, by the direction of the Crown, of the court and manor of *Berkhamstead*, under the care and presidency of Serjeant *Dodderidge*, afterwards a Judge of the Court of King's Bench, and the reputed author of *Sheppard's* Touchstone.

This survey lays down the boundaries of the manor very clearly and distinctly, and they include the whole of what is called the hallimote of *Northchurch*. It states that 3437 acres are held by freehold tenants of the manor, and 650 acres are held by copyhold tenants of the manor. The survey states the whole circumference, which is about eleven miles, and it distinctly points out the exact boundaries, including the common and four pieces of waste in question in this cause. The accuracy of this survey, and of this boundary of the manor, does not seem ever to have been called in question. The admissibility of it in evidence is contested, and the commission on which it was founded is not produced or proved. Still I am of opinion that it is strictly evidence, and also that the character of it is such that the Court is bound to attribute great weight to it. In October, 1616, another survey was made by the Duke of *Cornwall*.

The Court for the borough of *Berkhamstead* was held in the town itself; the Court for the hallimote of *Northchurch* was held in the castle of *Berkhamstead* (1). If the accuracy of the Defendant's contention is admitted, it involves this dilemma, that either the Court for the manor of the hallimote of *Northchurch* was held in a place not within the manor, or else that the castle of *Berkhamstead* did not lie within the manor of *Berkhamstead*—in either case an anomalous circumstance, which the fact of the five manors belonging to the honour of *Berkhamstead* does not remove, because their courts are not all held in the same place. Not only are all the entries made in the same book of rolls, but the tenants of each division are continually cited to both Courts. This appears by a series of entries in the books.

When I come to consider the rights of the tenants of the manor, whether united or severed, the evidence is strong to shew that the commonable rights of the tenants were never severed, or considered as capable of being treated apart from each other. On this subject the constant discussions and disputes relating to the inclosing and approving by the lord of parts of the waste afford valuable and unquestionable evidence. The first of them, a transaction of great importance, occurred in the year 1618. This was an arrangement made between the Prince, the Duke of *Cornwall*, on one side, and the tenants of the manor on the other, to settle what portions of the waste might be inclosed for the benefit of the lord, leaving sufficient for the tenants of the manor who had rights of common over the waste. In the discussion and settlement of this question no distinction is made between the tenants of the borough of *Berkhamstead* and the tenants of the hallimote of *Northchurch;* they are all treated alike as having equal rights and claims as tenants of one manor, and finally it is settled between them that 300 acres may be approved by the lord, and that this will leave sufficient for the commonable rights of the tenants over the remainder of the waste without any separation of the waste, or any attribution of any part of it to the borough or to the hallimote. I think it unnecessary to go through all the docu-

(1) The borough and castle of *Berkhamstead* are both in the parish of *Berkhamstead St. Peter*. The latter is distant about half a mile from the boundaries of the borough.

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ments relating to this transaction, but throughout the tenants of *Northchurch* make common cause with the tenants of the borough, and seem alike to be treated as tenants of the manor of *Berkhamstead*.

In the year 1634 an attempt was made on the part of the Duke of *Cornwall*, which was continued with more or less assiduity until April, 1642, to approve 400 acres more of the waste, not as the waste belonging to two manors, but as one waste belonging to one manor. This was resisted by the tenants of both without distinction. The resistance was successful, and the plan was ultimately abandoned, as I shall presently state somewhat more in detail.

The same appears in the Parliamentary surveys of 1650 and 1653, in which no distinct manor of the borough and of the hallimote of *Northchurch* is to be discovered.

In 1649 to 1654 the attempt was renewed to obtain 400 additional acres, part of the waste, from the commons, and this again was successfully resisted.

It is impossible too carefully to examine the documents which relate to the circumstances connected with the arrangement by which the 300 acres were approved, and those which portray the successful resistance to the approvement of 400 more acres. They are fully and minutely set forth in the documents proved in this case.

The various Acts of Council from the 19th of May, 1618, to the 29th of January, 1619, the commission and articles of the 14th of August, 1618, and the warrant of the 20th of February, 1619, clearly establish how complete and careful was the arrangement and compromise which was entered into when the first 300 acres were inclosed from the waste.

Here it might have been supposed that the attempts of the lord on the waste would have ceased; but twenty years afterwards the attempt was renewed and, if successful, would have left little or no waste for the tenants of the manor. The manner in which this attempt was conducted, and how it was attempted to be enforced, are described in the warrant of the 13th of November, 1638, to *F. Wytherhed*, and the summons in the same month to the commoners to attend. This is followed by a copy of the minutes of proceedings in February, 1637, and May, 1639, by

the articles of instruction of the 3rd of July, 1639, and the report of the 22nd of October, 1639, respecting the 400 acres, and the return of the Commissioners concerning them, and is completed by a lease of these 400 acres granted to *Jane Murray*.

This, however, did not prevent or abate the strenuous efforts of the commoners to prevent the 400 more acres being taken from them. How the contest continued down to April, 1654; how in April, 1653, the interest of the duchy was sold to Messrs. *Ellis & Phillips;* and how, on the 27th of April, 1654, this claim was dismissed, and the right of the commoners permanently established in spite of a series of proceedings in the House of Lords, is very minutely detailed in the documents, and with much interest shews the success of the tenants of the manor. In fact, these identical 400 acres now in question, or very nearly the same, are those the inclosure of which was so strongly and so successfully resisted in the reign of *Charles* and during the subsequent protectorate of *Cromwell*, and these the late Earl has attempted to inclose. This was forcibly resisted by the present Plaintiff. Unquestionably in such a state of things, and seeing how carefully the matter has hitherto been investigated, and having regard to the circumstance that the rights of the lord and of the tenants of the manor have remained unaltered, it is manifest that the burden of proof lies most expressly on the Defendant, the present Earl, who seeks to support this encroachment, to shew that the late Earl was entitled to make this approvement, and that he is entitled to support it.

Upon the whole, a full consideration of the documents convinces me that though these two manors were for some purposes distinct, that for the purpose of commonable right, and so far as regards the waste, they together formed one manor of *Berkhamstead*, and that the rights of the tenants of the manor over the waste were common to the tenants of the borough of *Berkhamstead* and to the tenants of the hallimote of *Northchurch*, and that no waste has ever been, or can now be, properly defined or set out as belonging separately to either manor, but that both enjoyed indiscriminately and in common the whole waste.

As to what these commonable rights were, the inference to be drawn from the documents as to the nature and extent of them shews that they include almost every commonable right, except

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the right to estovers and to recreation or pastime on the waste; as to these, no evidence is given in favour of the Plaintiff.

The *vivâ voce* evidence confirmatory of the documentary evidence is also all one way, and conclusive as to the manner in which these rights have been enjoyed during the memory of any one now alive. It is unnecessary to advert to it in detail; and it is, in my opinion, comprehensive, conclusive, and uncontradicted.

Besides the matters above mentioned, as having been adduced by the Defendant, besides disputing the admissibility in evidence of the survey by Mr. Justice *Dodderidge* in 1607, he also brings forward several technical objections to the frame of the Plaintiff's bill.

He contends that the Plaintiff cannot properly sue on behalf of himself and the freeholders and copyholders of the manor, and that this constitutes a misjoinder; but I am of opinion that this objection fails, and that, though their rights of common might not be exactly co-extensive, yet, as the Plaintiff is proved, and, indeed, admitted, to be a copyholder as well as a freeholder of the manor, and, indeed, of both divisions of it, he is entitled to sue on behalf of all. This also appears to me to be established both by authority and by the constant practice of this Court in like cases, and also in cases where a right of fishing comes in question, as in the case of the *Mayor of York* v. *Pilkington* (1).

The evidence of user relates to twenty-nine different properties, and in eighteen of these cases it is admitted that the property constitutes either a freehold or copyhold tenement of the manor; assuming that I am right in coming to the conclusion that these tenements of either manor (if then there be two manors) have indiscriminately commonable rights over the whole waste.

I think, therefore, that the frame of the suit is correct; and that, as regards the common right of herbage, pannage, and the cutting of furze and gorse, the right is established.

It remains, then, for the lord to shew that he is entitled to approve, and that sufficient is left for the commonable rights of the tenants. This he has entirely failed in doing; indeed, he has not attempted it; and, in fact, the attempt made by the late Earl is only a renewal of the attempts made in 1638 and 1642, and which did not end till 1654, to inclose exactly the same land,

(1) 1 Atk. 282.

or nearly so, which encroachment was then resisted, and for which there appears to me to be as little justification now as there was in the 17th century. I consider the case of the Plaintiff to be proved, and that no sufficient ground for doubt is laid to induce me, as I am asked, to send this case for further investigation, as I considered myself bound to do in the case of the *Hampstead* common (1). I think, therefore, that the Plaintiff is entitled to a decree in the terms of the first paragraph of the prayer of the bill, omitting the word "estovers," and omitting the right to use the common for recreation; and that a perpetual injunction must be granted in the terms of the second paragraph of the prayer of the bill. I think, also, that the costs must follow the event.

It is true that the present Defendant did not erect the fence, nor did he seem to desire, by any active steps, to support the encroachment; and if he had abandoned the case when he succeeded the late Earl his estate (that is, the late Earl's) would alone have been liable for costs, but the present Defendant has thought proper to stand exactly in the place of the late Earl, against whom the first proceedings were instituted. I do not think that it was necessary to proceed with the action at law; and I think that the case was better fitted for a Court of Equity, and that the pendency of the action of trespass ought not to affect the question of costs.

Solicitors: Messrs. *Fawcett, Horne, & Hunter;* Messrs. *Nicholl, Burnett, & Newman.*

(1) *Hoare* v. *Wilson*, not reported, as issues were directed, without any judgment on the points of law being delivered. *(see 18 VIR 272 n.)*

M. R.

1870

Jan. 17, 18.

FINLASON *v.* TATLOCK.

Will—Construction—Gift of Personalty to Children or their Heirs.

A testator gave his residuary personal estate to trustees upon trust for his wife during her life, and at her death for his children "or their heirs":—*Held*, that this was a substitutionary gift to the next of kin, according to the statute, of a child dying before the period of distribution.

THIS was the further consideration of a suit for the administration of the trusts of the will of *John Hardcastle*. The will was dated the 10th of December, 1841; and the testator, after directing all his debts, funeral and testamentary expenses, to be paid, and bequeathing a legacy of £100 to each of his children on their attaining twenty-one, or (as to daughters) marrying, proceeded as follows: "All the rest of my property I give to my son, *John Hardcastle*, and *William Thomas Tatlock*, and Mr. *William H. Thompson*, whom I appoint executors of this my will, in trust; the interest to be paid to my dear wife, *Esther Hardcastle*, during her natural life, and at her decease the principal and interest to be equally divided amongst my children or their heirs."

The testator died on the 10th of December, 1841, possessed of considerable personal estate, but of no real estate.

Esther Hardcastle, the testator's widow, died on the 25th of August, 1867.

John William Hardcastle, one of the testator's children, died a few days before *Esther Hardcastle*, having in his lifetime assigned his share of the residuary estate of the testator. The question now arose whether the assignee was entitled to this share.

Mr. *Jessel*, Q.C. (Mr. *Charles Browne* with him), for the Plaintiff, submitted that the gift was to the children living at the death of the tenant for life, with a substitutionary gift to the "heirs" of those who were then dead, and that by "heirs" were meant the persons entitled under the Statutes of Distribution, citing *Doody* v. *Higgins* (1); *King* v. *Cleaveland* (2); *Jacobs* v. *Jacobs* (3); *In re Craven* (4); *In re Philps' Will* (5).

(1) 9 Hare, App. xxxii.; S. C. 2 K. & J. 729.

(2) 26 Beav. 26, 166; 4 De G. & J. 477.

(3) 16 Beav. 557.

(4) 23 Ibid. 333.

(5) Law Rep. 7 Eq. 151.

Mr. *Bristowe*, Q.C., for the assignee:—

King v. *Cleaveland* (1) was a very peculiar case. The exact words there were, "amongst my nephews and nieces . . . then living, or their legal personal representatives, share and share alike." The judgments of the Lord Chancellor and Lord Justice *Turner* turn on the use of the expression "share and share alike;" while Lord Justice *Knight Bruce* appears to have considered that the gift was an absolute one to the nephews and nieces, and that the words "or their legal personal representatives" were surplusage. In *Hinchcliffe* v. *Westwood* (2) the Lord Justice *Knight Bruce* put a similar construction on the same words. In *Re Walton's Estate* (3) a gift to children "or their heirs or assigns" was held to be an absolute gift to the children. In *In re Philps' Will* (4) the gift was to the children then living, or their heirs; and your Lordship said: "I think the testator uses the word 'heir' as it is commonly, I may say vulgarly, used in society—for the person who takes the property after another person's death; that is, he meant those to take the property who would take it according to law, if the property had vested in the person in his lifetime, and he had died without making a will." Here the person who would take the property in that way would be the administrator of the child, and I submit, therefore, that this is an absolute gift to the children of the testator.

Jan. 18. LORD ROMILLY, M.R.:—

I have looked carefully into the cases which were cited to me, and I think they are quite conclusive that the words of this will amount to a substitutionary gift. The words are these:—[His Lordship read them.] It is quite clear that these words cannot be turned into the meaning which Mr. *Bristowe* wishes me to give to them without changing "or" into "and;" but I think that is impossible. Unquestionably in some of the old cases—as, for example, *Brownsword* v. *Edwards* (5)—very much was done in that way, but all the later cases say that you are to give words their plain meaning without introducing lawyers' refinements. Here

(1) 26 Beav. 26, 166; 4 De G. & J. 447.
(2) 2 De G. & Sm. 216.
(3) 25 L. J. (Ch.) 569.
(4) Law Rep. 7 Eq. 151.
(5) 2 Ves. Sen 243.

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the gift is to the children or their heirs. One of the children is dead. Why are his heirs not to take? If they do not take, and the children had all died in the lifetime of the testator, then, but for the provisions of the last *Wills Act*, you would have had an intestacy. I do not think that is the meaning of the will. I have no doubt that the meaning is to give by way of substitution. He gives a share to each child; and if the child be dead, to his "heirs"—that is, the next of kin according to the statute. As to this last point, I think the case of *In re Philps' Will* (1) is conclusive.

Solicitors: Mr. *H. Harris*; Mr. *F. Robinson*.

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MESSEENA *v.* CARR.

Will—Trustee—Discretionary power to lay out a sum in purchasing an Annuity—Payment to Annuitant.

Bequest of a share of residue to trustees upon trust to pay the income to *C.* for life, with a gift over of the principal, and a proviso that it should be lawful for the trustees, if they should think it desirable, to purchase with such share for the benefit of *A.* an irredeemable annuity. No annuity was purchased, but the acting trustee paid to *A.* various sums exceeding the income of the share, and amounting together to three-fourths of the capital:—

Held, that the discretionary power was *pro tanto* well exercised, and that the remaindermen on the death of *C.* were only entitled to so much of the share as was undisposed of.

MARY CHAPELHOW, by her will, gave her residuary estate to her two trustees, *G. B. Carr* and *Thomas Robinson*, upon trust, as to one-fifth of the income thereof, to pay or apply the same as they might deem advisable unto or for the benefit of her son *John Chapelhow* during his life, and after his death she declared that the trustees should hold the one-fifth share upon trust for her daughter *Grace Messeena* and her children; and the will contained the following proviso:—

"Provided nevertheless, and I further direct that it shall be

(1) Law Rep. 7 Eq. 151.

lawful for my said trustees or trustee, if they or he think it desirable so to do, by and with such one-fifth part or share to purchase in the name or otherwise and for the benefit of my said son *John Chapelhow* an annuity of such amount as can be thereby obtained and the same will produce for his life, such annuity not to be redeemable. And I leave it to the discretion of the said trustees or trustee to purchase the said annuity from Government, or any public company, or upon any private security."

The testatrix died in 1852. The one-fifth share of the residue of her estate amounted to £364. No annuity was purchased for *John Chapelhow*, but various payments were made to him from time to time out of the capital of the one-fifth share, exceeding the amount of interest and amounting in the whole to £271, by *Robinson*, who was the acting trustee of the will, and who had since died. *Carr* had only acted as trustee for the sake of conformity.

After the death of *John Chapelhow* a suit was instituted for the administration of the estate of the testatrix, and the question arose, on further consideration, whether the power for the purchase of the annuity for *John Chapelhow* had been properly exercised by the payments made to him out of the principal, or whether *Grace Messeena* and her children were now entitled as against *Carr*, the surviving trustee, and *Robinson's* representatives, to the whole of the one-fifth share.

Mr. *Southgate*, Q.C., and Mr. *W. Barber*, for the Plaintiffs:—

Under the will of the testatrix, *John Chapelhow* took a gift for life of the income of the share, with a superadded power to the trustees at their discretion to invest the principal in the purchase of an annuity. This was a power to be exercised once for all, and the payments made to *John Chapelhow* from time to time were no exercise of the power at all.

A power to trustees to apply a sum of money at their discretion for a particular purpose does not confer a gift: *Cowper* v. *Mantell* (1).

Moreover, the power was to be exercised at the discretion of both the trustees, so that the payments in question having been made by *Robinson* alone could not satisfy the terms of the power.

(1) 22 Beav. 231, 236. 2 Jur. N.S. 746.

M. R. 1870 MESSEENA v. CARR.

On these grounds we contend that the trustees cannot be allowed the payments in question, and the gift over of the whole share takes effect.

Mr. *Archibald Smith*, for the Defendant *Carr*:—

A power exercised is the same as a trust. Where there is a trust to lay out a sum in the purchase of an annuity, that amounts to a gift of that sum; therefore, where there is a power to lay out a sum in the purchase of an annuity there is a power to give that sum, and when the sum is given to the person for whom the annuity could have been purchased, it is a proper exercise of the power: consequently, where a part only of the sum authorized to be laid out in purchasing an annuity is so given, the power, *pro tanto*, is properly exercised, and, if so, it may be exercised from time to time by successive payments. It follows that the discretionary power was properly exercised by the payments made to *John Chapelhow*.

Mr. *Grenside*, for the representatives of *Robinson*, the deceased trustee.

Mr. *Southgate*, in reply.

Jan. 20. LORD ROMILLY, M.R.:—

The question in this case is, whether the power given to the trustees to lay out the one-fifth share of the residue at their discretion in the purchase of an irredeemable annuity for *John Chapelhow* has been properly exercised by the gift to him of the sums amounting to above three-fourths of whole share, or whether the gift over of the share to *Grace Messeena* and her children takes effect.

I am of opinion that the trustees had power instead of purchasing the annuity to give him the whole sum, and that therefore they were justified in giving him a part.

I had some doubts at first whether, as the discretion was to be exercised by the two trustees and one only had acted, the discretion had been properly exercised; but I have come to the conclusion that as the other trustee approved and sanctioned what was done

by the one who made the payments, no breach of trust was committed.

The only sum, therefore, to be accounted for is that which was not disposed of, and to that *Grace Messeena* and her children are entitled.

M. R. 1870 MESSEENA v. CARR.

Solicitor for the Plaintiffs: Mr. *T. Southgate*, agent for Mr. *T. Buckley, Rochdale.*

Solicitors for Mr. *Carr:* Messrs. *Stone, Billinghurst, & Wood.*

Solicitor for the representatives of Mr. *Robinson:* Mr. *F. C. Clarke*, agent for Mr. *Wylson, Appleby.*

In re ESTATES INVESTMENT COMPANY.

ASHLEY'S CASE.

M. R. 1870 Jan. 31.

Company—Winding-up—Contributory—Fraudulent Prospectus—Laches.

Where a suit has been instituted by a shareholder to be relieved from his shares on the ground of misrepresentations in the prospectus of the company, another shareholder similarly situated is barred by laches from obtaining the like relief unless after notice of the misrepresentations he promptly informs the company of his intention to claim the benefit of the decision in the first suit.

Pawle's Case (1) distinguished.

THIS was an application by the official liquidator of the *Estates Investment Company, Limited*, that the name of *Charles Henry Ashley* might be placed on the list of contributories of the company. The application was resisted on the ground that the case fell within the decision in *Pawle's Case* (1).

The company was registered on the 15th of February, 1865. In May following, the prospectus was issued. On the 15th of that month *Ashley*, on the faith of the statements made in the prospectus, applied for thirty shares in the company, and paid the usual deposit on such application. On the 23rd of May thirty shares were allotted to him, and he paid the amount of the call payable in respect of such shares on the allotment thereof.

In June, 1865, *J. R. Ross, H. Pawle*, and other shareholders of

(1) Law Rep. 4 Ch. 497.

M. R. 1870 ASHLEY'S CASE

the company, to whom shares had been allotted on the 23rd of May, but who had not paid the calls payable on allotment, discovered what they alleged to be fraudulent misrepresentations in the prospectus, and they refused to pay any calls on the shares, and formed themselves into a committee of "dissentient allottees," for the purpose of obtaining relief against the company in respect of these misrepresentations. In the same month the company brought actions against some of these shareholders for the recovery of the calls due from them; and in July one of them, *J. R. Ross*, instituted a suit of *Ross* v. *Estates Investment Company* (1), seeking to have the allotment of shares to him set aside, and the action brought against him restrained. By an arrangement entered into between the company and the solicitor of *Ross* and the other shareholders (the details of which are given in *Pawle's Case* (2)), the actions commenced by the company were stayed, to abide the result of *Ross's* suit.

Ashley was not a member of the committee of dissentient allottees. On the 18th of July, 1865, he attended a meeting of the company, at which the solicitor for the dissentient allottees was present, and spoke, insisting that many of the statements in the prospectus were misrepresentations; while the directors and officers of the company, on the other hand, denied that there were any such misrepresentations. It was stated at that meeting that a suit had been instituted to determine the question whether the statements complained of were misrepresentations or not. Under these circumstances *Ashley* appears to have resolved to take no steps in the meantime, but to await the result of the litigation.

In August 1865, a circular, signed by the secretary of the company, and dated the 21st of that month, was received by *Ashley*. It contained the following passages:

"I am instructed by the directors of the *Estates Investment Company, Limited*, to inform you that, at the request of the dissentient shareholders, they have consented to stay legal proceedings until November next, with a view, if possible, of amicably settling their differences.

"The directors, whilst retaining their rights and full powers of action, and feeling convinced that their proceedings have been

(1) Law Rep. 3 Eq. 122. (2) Law Rep. 4 Ch. 497.

strictly regular and correct, are desirous of forwarding the best interests of the company, and are therefore making such arrangements as they believe will meet the views of all interested; the season of the year, however, creates delay, as many parties are out of town; but as soon as possible the directors will communicate the result to the shareholders."

The circular then went on to state arrangements which had been made for the purpose of carrying on the business of the company.

On the 20th of November, 1866, Vice-Chancellor *Wood* made a decree in favour of the Plaintiff, in *Ross* v. *Estates Investment Company* (1). *Ashley* saw a report of the judgment in the newspapers a day or two afterwards, and, as he deposed, then "first became aware of the details and real nature and intent of the misrepresentations which had been made." He thereupon called at the office of the company, and saw the secretary, and inquired when the directors would return the money he had paid upon his shares, in accordance with the decision of the Vice-Chancellor. The secretary informed him that they would not then do so, as they were going to appeal from the decision. *Ashley* subsequently received a circular, signed by the secretary of the company, and dated the 24th of November, 1866. It simply stated that the case of the dissentient allottees had been decided against the company, and that it was the intention of the directors to appeal against the decision forthwith.

On the 16th of March, 1867, an order for winding up the company compulsorily was made on the petition of the secretary of the company.

On the 29th of July, 1868, the decree of Vice-Chancellor *Wood* was affirmed by the Lord Chancellor (2).

No proceedings were ever taken by *Ashley* to have his name removed from the register of shareholders.

Mr. *Roxburgh*, Q.C. (Mr. *Higgins* with him), for the official liquidator, submitted that the case was entirely distinguishable from *Pawle's Case* (3). *Ashley* was never a member of the committee of dissentient allottees, nor party, directly or indirectly, to

(1) Law Rep. 3 Eq. 122. (2) Law Rep. 3 Ch. 682.
(3) Law Rep. 4 Ch. 497.

M. R. 1870 — ASHLEY'S CASE.

any action or suit between them and the company. He knew of the misrepresentations on the 18th of July, 1865, and never repudiated the shares until November, 1866. He was therefore debarred by his delay from any relief to which he might have been otherwise entitled. He referred to *In re Cleaveland Iron Company* (1).

Mr. *Jessel*, Q.C., Mr. *Swanston*, Q.C., and Mr. *Everitt*, for *Ashley*:—

If a shareholder has been induced to take his shares by misrepresentation, and he repudiates them, having in the meantime done nothing to affirm his contract (in which is to be included his not having been guilty of delay after coming to a knowledge of the facts), then the directors of the company are bound to remove his name from the list of shareholders. That is settled by *Reese River Silver Mining Company* v. *Smith* (2).

Scholey v. *Central Railway Company of Venezuela* (3) was some-

(1) 16 W. R. 95.
(2) Law Rep. 4 H. L. 64.
(3) 1867. 11 July. M.R.
1868. 18 April. L.C.

SCHOLEY *v.* CENTRAL RAILWAY COMPANY OF VENEZUELA.

THE bill was by a shareholder in the *Central Railway Company of Venezuela, Limited*, and it prayed similar relief to that sought in the suit of *Kisch* v. *Central Railway Company of Venezuela* (3 D. J. & S. 122; S. C. Law Rep. 2 H. L. 99), and on the same grounds.

The company was registered in July 1864. On the 18th of that month the Plaintiff received the prospectus containing the misrepresentations complained of, and on the same day he applied for fifty shares. On the 24th of July these shares were allotted to him.

On the 15th of March, 1865, a report was issued by the directors of the company, containing statements from which, in the opinion of the Court, the Plaintiff might have discovered the misrepresentations contained in the prospectus.

The Plaintiff received a copy of this report shortly after it was issued.

On the 8th of April, 1865, he received a dividend of 2½ per cent. on his shares; and in the same month he paid a call on his shares.

On the 22nd of July, 1865, a report of the decision of the Lords Justices in *Kisch* v. *Central Railway Company of Venezuela*, appeared in the *Times* newspaper, and upon reading that *Scholey* appeared for the first time to have taken any steps to have the allotment of shares to him set aside; the bill, however, was not filed until the 6th of October.

The Master of the Rolls dismissed the bill without costs; and from this decision the Plaintiff appealed.

Mr. *Baggallay*, Q.C., and Mr. *Swanston*, for the Plaintiff.

Mr. *Jessel*, Q.C., and Mr. *W. Morris*, for the Defendant.

what similar to this case, but there the Plaintiff affirmed the contract by paying a call and receiving a dividend after he knew the facts.

LORD CAIRNS, L.C., in giving judgment, said that the Plaintiff described himself as a tobacco broker, and a man of business in the city, and his case was that the prospectus issued by the company came into his hands, that he read it, and attached a definite and distinct meaning to the statements it contained; and that these statements were in his view material, and influenced him in taking shares in the company. Starting with this case, the Plaintiff admitted that another document had come into his possession on or very close to the 15th of March, 1865. It was out of question that the Plaintiff could be allowed to say that he read the first document and attached a definite meaning to the statements contained in it, and that he read the second document, but was ignorant of or inattentive to the statements in it, they being statements on the very matters to which the first document was addressed. It was fair to impute to the Plaintiff at the least an equal attention in reading the second document as in reading the first; probably, it might be the sounder conclusion to impute to him a greater degree of attention, because a person who had invested his money in a speculation of this kind, and who in the course of business had official documents submitted to him, would naturally look at them much more narrowly and critically than at a document issued in the form of a prospectus, and of a much more general character.

That being so, it was his Lordship's opinion that a person of the most ordinary intelligence reading that second document, and feeling the slightest particle of interest in the affairs of the company, could not have failed to see in the most plain way that with regard to the four matters which were relied on in the House of Lords with regard to the prospectus, the statements in the prospectus could not be supported. He would assume in favour of the Appellant, that if he had come quickly after the 15th of March, the Court would have given him relief. He certainly thought that the Court would be most careful to see, in a company going on and trading, in which the rights of the shareholders and others varied from day to day, that a person coming to complain of misrepresentations of this kind, and coming to avoid a voidable contract, came within the shortest limit of time which was fairly possible in such a case; but in the present case there really was no necessity for measuring nicely the limit of time, because Mr. *Scholey* having got this report and read it, paid without remonstrance a further call on his shares, and received a dividend. If anything could affirm a voidable contract it would be conduct of that kind. By receiving a dividend he elected to continue a member of the company, and having done that he could not come next day or next week and file his bill, much less in October following.

The decision of the Master of the Rolls was therefore perfectly right. If the case had come before him (the Lord Chancellor) in the first instance, he was not satisfied that he might not have thought it proper to dismiss the bill with costs; and certainly the appeal must be dismissed with costs.

Solicitors: Messrs. *Bannister & Robinson;* Messrs. *Ashurst, Morris, & Co.*

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Here all that *Ashley* learnt at the meeting in July, 1865, was that a suit was pending which was to decide all questions. Then the directors send him a circular, telling him that arrangements are being made for settling all questions in dispute between the company and the dissentient shareholders. What could he do but wait and see the result of these arrangements? *Pawle's Case* (1) shews that it would have been wrong in him to file a bill, and there was no opportunity of trying the question in an action. The moment he learns the result he applies to the secretary to return him the money he has paid. The secretary refuses; not because he is not entitled to have his money back, but because the company are going to appeal. Then, pending the appeal, the company is ordered to be wound up on the petition of this very secretary. The company cannot take advantage of a winding-up order thus obtained to deprive *Ashley* of his clear right to repudiate his contract.

The case is very different from those cases in which shareholders were not allowed to repudiate their shares on the ground that the object of the company, as defined by the memorandum and articles of association, was different from that proposed by the prospectus, as, for example, *Lawrence's Case* and *Kincaid's Case* (2). In these cases it was held that it was the duty of the shareholder to examine the articles of association, which clearly it is always in the power of a shareholder to do. Here *Ashley* had no means of getting at the facts until the result of the litigation was known. He acceded to the litigation as soon as he knew the facts, and that is enough to bring him within the decision in *Pawle's Case*.

LORD ROMILLY, M.R.:—

I think Mr. *Ashley* must be put on the list of contributories. The leading principle in all these cases is this: a man must not play fast and loose; he must not say "I will abide by the company, if successful, and I will leave the company if it fails;" and therefore, whenever a misrepresentation is made of which any one of the shareholders has notice, and can take advantage to avoid his contract with the company, it is his duty to determine at

(1) Law Rep. 4 Ch. 497. (2) Law Rep. 2 Ch. 412.

once whether he will depart from the company, or whether he will remain a member. When I say "as soon as he has notice," I do not mean that he may stand by when a great number of people tell him that misrepresentations have been made by which shareholders have been induced to take shares, and that he may wait until it is decided by a court of justice that there have been misrepresentations; on the contrary, I mean that it is his duty in such a case to go and ascertain for himself whether there is a misrepresentation or not. What takes place here is this: there is a meeting of shareholders on the 18th of July, 1865, and some eighteen or nineteen of the persons present dissent, and say they will have nothing whatever to do with the company; upon which it is agreed, and an arrangement made, by which one of them is to file a bill, and all the others are to be bound by the decision in that suit. Mr. *Ashley* is at that meeting. He does nothing. He does not say he dissents; he does not say he assents. Then the question is asked, What could he have done? Nothing is more clear than what he could have done. He could have written to the company, and said, "I dissent; and if you will agree, I will be bound by the decision in this case which is being tried." But he remains quiet for sixteen months; and if the company had been successful, and the directors had said, when the decision in *Ross's Case* was given: "You are a dissentient shareholder, and are bound by this decision," he would have replied, "Where do you find that? I challenge you to put your finger on anything to shew I ever dissented;" and he might have taken the whole of his share of the profits of the company, whatever they were. But if he had expressly said, "I am a dissentient shareholder, and I put myself in that list," it follows that if the company had been successful, he could not afterwards have claimed a share of the profits of the company; but he would have been bound by the decision in the case of *Ross*.

I do not think the fact of the secretary saying "we shall not pay now because we are going to appeal against the decision," affects the case in the slightest degree. It is a mere refusal to pay him back his money. It is not said, "We will pay you back the money if the appeal is unsuccessful." This is the simple case of a shareholder who knows that nineteen other shareholders of the company dissent, and that the company has suspended legal pro-

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ceedings until it is determined whether these shareholders are entitled to dissent; but he does not make up his mind whether he will assent or dissent until the question is decided; and in the meantime the company are buying estates and carrying on business. I am of opinion that this does not fall within *Pawle's Case* (1) and that it does fall within *Scholey* v. *Central Railway Company of Venezuela*.

Solicitors: Messrs. *Batt & Son*; Mr. *H. Harris*.

M. R. 1870 *Jan.* 29; *Feb.* 9.

In re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.

ZULUETA'S CLAIM.

Company—Power of Directors—Ultrà vires—Completion of Contract—Articles of Association—Notice.

A company cannot recover back from a person who, at the request of the directors, has supplied goods to the company, money paid by the directors to him for the goods so supplied, although the purchase may have been wholly *ultrà vires*. The only remedy of the company in such a case is against the directors personally.

Where, therefore, the broker of a banking company, acting under the instructions of the directors, bought shares in the company on behalf of the company, and was credited with the price paid by him for the shares in his banking account kept with the company, and the company was afterwards wound up:—

Held, that, although the transaction was *ultrà vires* of the directors, the broker was entitled to prove against the company for the balance appearing due to him on his account, including the item credited to him in respect of the shares.

IN November, 1864, the directors of the *London, Hamburg, and Continental Exchange Bank, Limited*, being desirous of keeping up the price of the shares in the bank, resolved to purchase shares in the market. No entry of this resolution was entered in the minute book; but Mr. *Henry*, the broker of the bank, was called into the board room, and directed to purchase a "round number" of shares and was informed at the same time that part of these shares would be taken by the directors and the rest by the bank. In com-

(1) Law Rep. 4 Ch. 497.

pliance with these instructions Mr. *Henry* bought 175 shares at the average price of £11 4*s.* 1*d.*, and paid for these shares in the first instance out of his own moneys. Subsequently sixty-two of these shares were transferred to directors of the company or their friends, who repaid *Henry* the price he had paid for them, and the remaining 113 were transferred, first into the name of one of the clerks of the bank, and then into the name of one *Marshall*, who had no beneficial interest in the shares, but consented to have them placed in his name as a trustee for the bank, upon being requested by one of the directors so to do. After the 113 shares had been thus transferred to *Marshall*, the secretary of the bank delivered to *Henry* a ticket directing the cashier to credit the account which *Henry* kept at the bank with £1343 11*s.* 5*d.*, being the amount paid by him for these 113 shares. The account, which at this time shewed a balance of upwards of £19,000 due to *Henry*, was accordingly credited with this amount, and *Henry* afterwards drew on the account, and was allowed interest on the balances from time to time remaining in the hands of the bank. The company was afterwards ordered to be wound up, and at the commencement of the winding-up a considerable balance appeared by the account to be due from that company to *Henry*.

Messrs. *Zulueta* employed *Henry* as their broker, and placed large sums of money in his hands for investment. A considerable portion of these sums was lent by *Henry* to the bank; and they had obtained an order in the winding-up giving them liberty to prove in the name of *Henry* for the balance appearing to be due to *Henry* on his account with the bank. The question on this adjourned summons was, whether the above balance ought not to be reduced by the sum £1343 11*s.* 5*d.*, credited to *Henry* as above mentioned, it being alleged by the official liquidator that the purchase of shares of the bank on behalf of the bank was *ultrà vires*.

The question, whether the directors or the company had power to invest in the shares of the company, was discussed at considerable length; but the nature of the judgment renders it unnecessary to report the argument on this head or to set out the portions of the memorandum and articles of association on which such agreement was founded.

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In re London, Hamburg, and Continental Exchange Bank.

Zulueta's Claim.

It appeared that of the shares transferred to *Marshall* fifty remained standing in his name at the commencement of the winding-up, the rest having been transferred to various holders. *Marshall* had been placed on the list of contributories in respect of these fifty shares.

Mr. *Jessel*, Q.C., and Mr. *Haynes*, for the claimants:—

Assuming the transaction to be *ultrà vires*, Mr. *Henry* was not bound to know it. He was simply the broker of the company; he was directed by his employers to do a particular thing and did it accordingly. Is it to be held that every *employé* of a bank is bound to be a lawyer, and to know when his masters are giving him orders which are *ultrà vires*, and when they are not? And in the latter case, after the transaction is completed, is he to be punished simply for obeying his masters' orders?

Mr. *Roxburgh*, Q.C., and Mr. *Hastings*, for the official liquidator:—

The directors of a company are merely agents of a company and have only authority to conduct the company's affairs in the ordinary way of business. Every person is bound to know the limits of this authority: *Ernest* v. *Nicholls* (1); *Burmester* v. *Norris* (2); *In re German Mining Company* (3). If then the directors had no power to invest in the shares of the bank, this transaction was *ultrà vires*, and the item in the account cannot be allowed.

But, further, supposing that the directors had power to invest in the shares of the bank, this was not a *bonâ fide* exercise of the power. The object of the directors was not to invest, but to keep up the price of the shares. Mr. *Henry* either actually knew, or must be taken to have known, the real object of the directors, and on this ground, also, the transaction cannot stand: *Joint Stock Discount Company* v. *Brown* (4); *Royal Bank of India's Case* (5).

Mr. *Jessel*, in reply:—

In the first place, this proceeding is equivalent to the company seeking to recover back from *Henry* a sum of money which they

(1) 6 H. L. C. 401. 3 Jur. N. S. 919
(2) 6 Ex. 796.
(3) 4 D. M. & G. 19.
(4) Law Rep. 3 Eq. 139; Ibid. 8 Eq. 381. 12 Jur. N. S. 899
(5) Ibid. 4 Ch. 252.

have paid to him, for *Henry* has actually been paid. It is true he has only been paid by means of an entry being made to his credit; but that is the same thing as if they had given him bank notes, and he had then paid them in to his account with the bank; and it was not necessary to go through this form. On what principle can they recover back a sum they have thus paid him?

But, further, even if they had not paid him, they could not have resisted the claim. If there was a possibility of their wanting shares, that was sufficient to authorize *Henry* to buy shares for them, and he was not bound to inquire for what purpose they wanted them: *Claim of Ebbw Vale Company* (1).

Feb. 9. LORD ROMILLY, M.R., after stating the facts, continued:—

In this state of facts I find it difficult to understand how the directors or the official liquidator can now say that *Henry* is not to be at liberty to prove for this amount. It is said that the act of the directors was *ultrà vires*, and that it did not bind the company; but, assuming this to be the case, it is difficult to see how they can recover back from a person to whom they have paid money for goods bought the money so paid. Suppose the transaction to be wholly *ultrà vires*, and that the company had gone on, could the directors or the company, on taking the account with *Henry*, their stockbroker, disallow this item, or require the money to be refunded by him? If the transaction were still *in fieri*, it might be so; but when it is concluded and the money paid, what other remedy have the shareholders of the company than to require the directors personally to repay the money of the company so improperly expended by them? I consider the transaction in question to be exactly the same as if the secretary had directed the cashier to pay the money in bank notes to Mr. *Henry*, and he had done so, and the amount had never appeared in his account at all. It was not the duty or the business of *Henry* to construe the articles of association of the company, or to decide whether the directors were or were not exceeding their powers; that was a

(1) Law Rep. 8 Eq. 14.

M. R. 1870 *In re* London, Hamburg, and Continental Exchange Bank. Zulueta's Claim.

matter entirely for their consideration; and they alone are responsible for their acts upon the conclusion that they have come to. Again, how was he to know how many shares were intended for the directors or their nominees? He delivered 173 shares; it was not his business to distribute them, or to award sixty-two to directors and 113 to the company; all that he was required to do was to deliver the shares, and what he was entitled to was to be paid for shares which he bought under their instructions. It would be an endless, and indeed an impossible matter for every person who has dealings with a joint stock company to ascertain whether the transaction lies within the scope of their power and authority. If it were incumbent on them to do so, it would be necessary in some cases to take the opinion of counsel on the subject, and it would in every case paralyze the powers and functions of the board, with whom no one would deal under such a restriction, unless the order were accompanied by an opinion of counsel, and, indeed, even then the trader would not always be safe. My opinion is that *Henry* is entitled to prove, and that the remedy of the shareholders, if any, is against the directors of the company personally.

Solicitors: Messrs. *Bothamleys & Freeman;* Messrs. *Deane & Chubb.*

M. R. 1870 Jan. 29.

Ex parte GREAT NORTHERN RAILWAY COMPANY.

Parliamentary Deposits Act (9 *Vict. c.* 20)—*Investment of Deposit—Gen. Ord. of Feb.* 1, 1861—30 *&* 31 *Vict. c.* 132.

A sum of money deposited in the *Bank of England* pursuant to the *Parliamentary Deposits' Act* (9 Vict. c. 20) is not "Cash under the control of the Court" within the meaning of the Order of the 1st of February, 1861, and can only be invested in Consolidated or Reduced Bank Annuities, or in Government securities, as provided by sect. 4 of the Act.

An application for an order for investment of such a fund in Bank Stock or New East India Stock (in which trustees are authorized to invest by the Act 30 & 31 Vict. c. 132) refused.

Part 34 § 1 Ch D 697.

THIS was a Petition for the investment of a sum of money deposited in the *Bank of England* in the name and with the privity of the Accountant-General by the promoters of a railway company pursuant to the Act 9 Vict. c. 20.

Sect. 4 of that Act empowers the Court, on a Petition being presented for that purpose by the person or persons named in the warrant under which the money has been deposited or the survivors or survivor of them, to order that the sum so deposited shall, until the same be paid out to the persons entitled to the same in pursuance of the Act, be laid out in the £3 per Cent. Consolidated or £3 per Cent. Reduced Bank Annuities, or any Government security or securities, at the option of the aforesaid person or persons, or the survivor or survivors of them.

Mr. *Cookson*, for the Petitioners, now asked that the fund might be invested in New East India Stock, in which trustees are now authorized to invest by the Act 30 & 31 Vict. c. 132; or, if this could not be done, in Bank Stock, or some other one of the investments sanctioned by the General Order of the 1st of February, 1861, which extends to all "Cash under the control of the Court," which, as he contended, this fund was.

LORD ROMILLY, M.R.:—

You are asking me to repeal the express provisions of an Act of Parliament. I can only order an investment in Consols, or Reduced Bank Annuities, or Government securities, as provided by the Act.

Solicitors: Messrs. *Hayes, Twisden, Parker, & Co.*

V.-C. S.
1869
Dec. 8.
1870
Jan. 20.

CHAPMAN *v.* CHAPMAN.

Solicitor and Client—Building Agreement—Mortgage Securities—Imprudence of Solicitor—Knowledge of Client—Charges of Fraud and improper Motives.

Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the Court dismissed the bill; and as fraud and improper motives were charged without evidence to support those charges, the bill was dismissed with costs.

THE Plaintiff, *Henry Chapman*, of *Westfield House, Canterbury*, who formerly practised as a medical man at *Calcutta*, and had invested his fortune in *India*, sought by this bill, as amended in May, 1868, to make the Defendants, carrying on business as solicitors in partnership, and who acted as his solicitors in negotiating certain advances made by him to *Richard Thomas*, a builder, responsible for their alleged misconduct in the management of his business.

By an indenture of agreement, dated the 20th of February, 1862, the trustees under the statutes passed "for enabling the Bishop of *London* to grant building leases of land in the parish of *Paddington*," covenanted with *Richard Thomas* that they would, as soon as certain messuages and buildings, which he covenanted to build, should be built and covered in, and the external works should be completed as therein mentioned, demise unto him four pieces of ground, situate on the east side of *Portsdown Road* (as in the agreement particularly described), together with all erections and buildings agreed to be erected on the same pieces of ground, with the appurtenances, to hold the same from the 25th of December, 1861, for a term of ninety-eight years, at the rents therein mentioned.

On the 25th of August, 1862, the Defendant *George Chapman*, a nephew of the Plaintiff and a member of a firm of solicitors, wrote to the Plaintiff thus:—"When you were in town you spoke to me of getting money from *India*. I could now, or any time within a month or six weeks, if it was now bespoken, invest £3000 on mortgage at

6 per cent. on property estimated at £6000, but to be valued by a surveyor on the lender's behalf, and the loan to be only up to one-half of the value. I merely mention this in case you should be on the look-out for anything of the kind, in which case I could send you full particulars. I know the security to be good. The objection to you would probably be that you could not recall your money under a three months' notice."

After the receipt of this letter the Plaintiff called at the Defendant's office, and was informed by his nephew that the proposed borrower was *Richard Thomas*, a client of the firm, a person worth £1000 a year of surplus rental, engaged in extensive building operations, for carrying on which expeditiously he required more capital than he then had available; that the property proposed to be mortgaged was comprised in a building agreement, and the Plaintiff was assured that the property was an ample security for £3000, and told that the houses when finished would be withdrawn from the security, yet that care would be taken in always having sufficient value in the security. The Plaintiff told his nephew that if he was perfectly satisfied with the security offered he was willing to advance £3000 at 6 per cent.

On the 15th of September, 1862, the Plaintiff, relying on the representations made to him by his nephew, and on the statement in the letter of the 25th of August, that the property would be valued by a surveyor on the lender's behalf, paid £3000 to him, to be advanced to *Richard Thomas* upon the security of the property comprised in the building agreement.

By an indenture dated the 16th of October, 1862, and made between *Richard Thomas* of the one part, and the Plaintiff of the other, after reciting the indenture of agreement of February, 1862, that no leases had then been granted in pursuance thereof, but that *Richard Thomas* was in the actual possession of the several pieces of ground thereby agreed to be demised; that *Richard Thomas* had applied to the Plaintiff to advance him from time to time such sums of money, not exceeding in the whole £3000, as he might from time to time require, upon the security of an assignment of the said agreement, and the benefit thereof in manner thereinafter appearing, which the Plaintiff had agreed to do; that in order to enable the Plaintiff to

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make such advances from time to time as and when *Richard Thomas* should require them to be made, the Plaintiff, on the 15th of September, 1862, set apart and appropriated the sum of £3000, so as to have the same ready at call; and that on and subsequently to the said 15th of September, 1862, the Plaintiff had advanced to *Richard Thomas* several sums, amounting in the whole to £2700, upon the faith of the intended security, and that the residue of the said sum of £3000 was then lying ready at call, so that the Plaintiff might be enabled to advance the same without delay when *Richard Thomas* should require the same; and that it had been therefore agreed, that as well all the sums so already advanced to *Richard Thomas* as the sums which should be thereafter advanced to him by the Plaintiff upon the security of the indenture should bear interest at 5 per. cent. from the 15th September, 1862, notwithstanding that some of such sums ought not have been advanced until after that day, *Richard Thomas* covenanted with the Plaintiff to repay to the Plaintiff on demand the sums so then already advanced, and all future advances, with interest at the rate of 6 per cent., from the 15th of September, 1862. And *Richard Thomas* assigned unto the Plaintiff all that the agreement of the 20th of February, 1862, and the full benefit thereof, and all the present and future estate and interest of *Richard Thomas* under or by virtue of the same agreement into and upon the said pieces of land and premises thereby agreed to be demised, and the buildings erected or to be erected thereon, subject to redemption on payment of the advances and interest. And the indenture contained a covenant for further assurance of all the premises, and for causing all leases which should be granted of the premises, except such as the Plaintiff should think fit to release from the security to be granted or assigned to the Plaintiff, subject to such equity of redemption, if any, as should then be subsisting, as by the Plaintiff should be reasonably required; and further, that in case the Plaintiff should so require, *Richard Thomas* would accept and take in his own name any one or more lease or leases of all or any part of the premises, and would thereupon forthwith grant to the Plaintiff an underlease or underleases for the term or terms for which such original lease or leases should be granted, less the last day thereof.

This indenture of mortgage was prepared by the Defendants on the Plaintiff's behalf, and as his solicitors, and the draft thereof was, on the instructions of the Defendants, settled on the Plaintiff's behalf by a conveyancing counsel, who wrote at the foot thus: "I have settled and approve of this draft. If it is desired to have any of the leases granted to Mr. *Thomas* without the mortgagee being made a party, the simplest course will be, before the lease is granted, to endorse on the security a short release of the particular property intended to be comprised in the lease from the security, without prejudice to the security over the residue of the property. This can be modified to suit the circumstances, either upon payment of a part of the amount owing, or in consideration of the substitution of some other security, or merely in consideration of the residue of the property being a sufficient security."

The Defendant *George Chapman* retained £41 15*s.*, part of the £3000, in satisfaction of moneys due to his firm for the costs of the mortgage deed, and £53 5*s.* to meet the Plaintiff's interest, and paid to *Richard Thomas* £2900. The Plaintiff alleged that the said Defendant took the mortgage from *Richard Thomas* without first having the property valued by a surveyor; that the Defendants neglected to have a memorial of the indenture registered until the 13th of July, 1864; that *Richard Thomas* did without his consent deal with the property under the advice of the Defendants, who acted as *Richard Thomas's* solicitors; that since the date of the mortgage the whole of the land had been covered with houses, and that the Defendants had procured leases of it and the buildings to be granted to *Richard Thomas* or to his nominees or to trustees for him. No lease or underlease of any of the premises had ever been made to or assigned to him, excepting that the Defendants, who held the underleases of certain portions of the property, had delivered the same to the Plaintiff's present solicitors, and with these exceptions the whole of the property had been sold by *Richard Thomas* and his trustees, or mortgaged by them for the full value thereof, to persons other than the Plaintiff.

The underleases of certain of the houses were, shortly after the granting thereof, mortgaged by *Richard Thomas*, and in particular three of the houses were demised to Lady *Hoghton* to secure £6000.

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One of these houses had been released by the Plaintiff to Lady *Hoghton*, and had been since sold by her for £5200, and the other two had been freed from the mortgage to Lady *Hoghton*. In transacting the several mortgages the Defendants acted as the solicitors of *Richard Thomas* and also of the several mortgagees, and while they were also acting as solicitors of the Plaintiff, but in no case did the Defendants inform the Plaintiff that any lease, underlease, sale, or mortgage was intended to be made, or require his consent thereto. On the 30th of June, 1863, the Defendant *George Chapman* wrote to the Plaintiff, stating that, "with respect to the security, the works have gone on most satisfactorily. I have withdrawn completed houses, and have got permanent mortgages on them at 5 per cent. in the course of less than a year to the extent of £45,000, and there remains in works, besides land as yet untouched, to secure your £3000, quite £8000. You have always had an ample margin. As to your £5000 [a sum which the nephew knew his uncle was anxious to lend on mortgage at 6 per cent.], the same client [*Richard Thomas*] is about to build eighteen houses on a very good site, for which he pays £1000 down. He is willing to borrow this £5000 at 6 per cent. for three or five years, in this way:—he will give you, first, a mortgage on the new site of ground, and a further charge on the old premises for as much as they jointly will secure, in the judgment of your surveyor, with the understanding that as the works progress on the new site the whole loan shall be transferred there solely. Mr. *Thomas's* banker will discount the bill at 5 per cent.; if you like, therefore, to complete at once he will take the bill as cash, paying you, however, only interest at 1 per cent. up to next September, when interest at 6 per cent. will begin. I think this can be worked out to be quite safe, if you like to entertain it." On the 5th of November, 1863, the same Defendant wrote to the Plaintiff to the effect that he had got a most satisfactory report from the surveyor named, and that he (the writer) had personally entire confidence in the matter (the building of the eighteen houses), for he did not see how it could be other than very successful; and on the 28th of November, 1863, he wrote, stating that "the second take of land to which it [the money of the Plaintiff] will chiefly be applied, and upon which I have an excellent report from the surveyor

named, will not be ready as a security for some little time; but, meanwhile, the first take on which you have lent £3000 is a good security for a much larger sum, and Mr. *Thomas* suggests that you should make him a further advance on this, to be shifted to the other when further progressed. In order to put this before you in a good shape, I have had a further survey made, which I enclose. If you feel, as I consider you may do, quite satisfied about this, and will send me up a crossed order, I will hand the amount to Mr. *Thomas*, taking his indorsed charge for the further advance on the existing mortgage. There is no question of the value of the property and the success of Mr. *Thomas's* operations. I have kept a constant watch on it, and the most experienced surveyors have recommended the houses as mortgage securities as soon as they are finished. If there were three times as many as there are I should have no difficulty in getting the money. This, of course, gives me great additional confidence." The report of the surveyor was sent to the Plaintiff. It had reference to fourteen houses only, the value of which was estimated at £13,000, and it was stated that they were a good security for a loan of £3000, "required by Mr. *Thomas* additional to the £3000 already lent upon the whole site." The Plaintiff, relying upon the representations contained in these letters and report, paid to the Defendant *George Chapman* the further sum of £3000 for the use of *Richard Thomas*, but the Defendants neglected to take an indorsed charge for the sum upon the existing mortgage. The Defendant *George Chapman* acknowledged the receipt of the money for *Richard Thomas*, and wrote to the Plaintiff, "You may depend on my taking care that you are perfectly secured in this matter." Another indenture of mortgage, dated the 16th of January, but not executed till the 12th of July, 1864, stated that the Plaintiff had advanced to *Richard Thomas* several sums, amounting in the whole to £3000, upon the faith of the intended security (articles of agreement dated the 15th of January but not executed till the 12th of July, 1864, between the same trustees and *Richard Thomas*, by which the former agreed to demise other lands for building purposes to the latter), and in which were contained covenants by *Richard Thomas*, substantially the same as those in the deed of the 16th of October, 1862; and in particular a covenant to cause all leases which should be granted

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of the premises comprised in the said agreement (when it was reduced into writing), except such as the Plaintiff should think fit to release from the security to be vested in him, subject to redemption; and also a covenant by *Richard Thomas*, that he would, if required by the Plaintiff, take leases in his own name of the premises agreed to be demised, and mortgage the same to the Plaintiff by way of underlease. This indenture was registered in *Middlesex* on the 13th of July, 1864. The above-mentioned £3000, and an additional £1000, advanced by the Plaintiff, were paid over to *Richard Thomas* some time before the 12th of July, 1864, and the Plaintiff was for such time without any security for these sums. On the 25th of February, 1864, the Defendant *George Chapman* wrote to the Plaintiff, stating, "I have been carefully into the question of your security on Mr. *Thomas's* property, and the surveyor has sent me a report which I forward on to you [the report shewed that the surveyor estimated the undisposed-of value of what Mr. *Thomas* had done towards the completion of the first and second takes of land (comprised in the agreements of the 20th of February, 1862, and the 15th of January, 1864,) at £12,575]. . . . I may just mention that in point of fact there is at the present time about £6000 further security in your hands not included in the report, because the rest being ample this will be allowed to be withdrawn very shortly." A statement of account was also sent to the Plaintiff which shewed that he had lent £3000 at 6 per cent. to *Richard Thomas*, on mortgage of building agreement and works thereon, dated the 20th of February, 1862, and £4000 at 6 per cent., partly on mortgage of building agreement and works thereon, dated the 15th of January, 1864, and partly by a further charge of the agreement of the 20th of February, 1862.

The Plaintiff alleged that the surveyor's report was in some respects wholly untrue, and that the property represented to be worth £12,575 was an altogether insufficient security for the £7000 which the Plaintiff was induced by the Defendants to lend to *Richard Thomas* on the security thereof. The Plaintiff on receiving the report examined the same, and without understanding the details therein given, relied upon it and upon the representations made to him by the Defendant *George Chapman*. On the 29th of February, 1864, the Defendant *George Chapman* wrote to the Plaintiff, stating

that "the whole place has now progressed to a stage of success that no longer admits of a doubt, and I feel sure the security is now more satisfactory than it ever was before. If Mr. *Thomas* came to grief to-morrow I could get the scheme taken up at its present point within a month." On the 20th of August, 1864, *Richard Thomas* was adjudicated a bankrupt. The Plaintiff wrote to the Defendant *George Chapman* for an explanation, and he, on the 8th of September, 1864, wrote, telling him that his money was perfectly well secured, and wholly unaffected by the bankruptcy, and he said, "I hold on your behalf at the present moment, as security for your money, actual realizable property £10,300, besides a lien on other property to which I can, if necessary, resort, value £9000; and this is not all." And after explaining the cause of the bankruptcy, he added, "The worst that will happen to you will be a delay of three or four weeks in payment of the quarter's interest due this month. If this should be any inconvenience to you I will undertake to pay it to you. . . . If you hear of any good securities that you would be satisfied to take in lieu of the present mortgage, will you let me know, because I have offers for the purchase of some of the property you hold pressed upon me and could repay you at almost any time." The Plaintiff alleged that these statements were, to the Defendant's knowledge, inaccurate, and that they misled him.

On the 15th of December, 1864, the Defendant *George Chapman* sent the Plaintiff £50 in part satisfaction of interest due. Between August, 1864, and May, 1865, the Plaintiff made several applications to the Defendant *George Chapman* for the repayment of his principal moneys and interest, and in May, 1865, it was arranged between them that the whole subject of the Plaintiff's securities should be submitted to Mr. *Rawlinson*, an equity barrister and a friend of the Plaintiff, for his consideration, and he on the 25th of May, 1865, after hearing explanations, suggested a fresh valuation of the securities; that the Plaintiff should have an assignment of certain of the leases so as to give him the legal estate in the premises as mortgagee, and that no fresh leases should be granted to *Richard Thomas* without the express consent of the Plaintiff; but these suggestions, though at first agreed to by the Defendant *George Chapman*, were not carried into effect by

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him. And in reference to this meeting, the Plaintiff alleged that it was stated by the Defendant *George Chapman* that Lady *Hoghton* was a mortgagee of three houses before mentioned; and it being represented by him that if one house were given up to her she would give up the other two to the Plaintiff, thereby preventing possible litigation between her and the Plaintiff, and also representing that upon the footing of that arrangement the value of the securities held by the Plaintiff would be £16,000, Mr. *Rawlinson* acceded on behalf of the Plaintiff to the proposed arrangement; but this allegation the Plaintiff in his affidavit stated was incorrect and that nothing whatever passed at the said meeting on the subject of any question between Lady *Hoghton* and himself, and that it was not until some time afterwards that he ever heard of Lady *Hoghton*.

The Plaintiff on the 30th of October, 1866, complained to the Defendants that they had not informed him of the value of the securities for the money lent to Mr. *Thomas*, and asked for the delivery up of all the securities and documents. The bankruptcy of *Richard Thomas* was annulled in March, 1866, but he was adjudicated bankrupt again in November, 1867. The Plaintiff had been made a Defendant in a suit, *Randell* v. *Thomas*, in which the usual foreclosure decree was made, and the Plaintiff compelled to incur costs; and he was liable to be harassed by other suits by mortgagees, to which he would be a necessary party by reason of the negligent way in which the Defendants had transacted his business.

The general result of the dealings by the Defendants or by *Richard Thomas* with their sanction, with the premises comprised in the two building agreements was, that the Plaintiff had no legal estate in any of the premises; that the vesting in the Plaintiff of the legal estate in such of the premises if any as still remained subject to his securities, could only be procured at great expense and with great difficulty, if at all; that as to any equitable interest which the Plaintiff might have in the premises, the nature and extent of it were, having regard to the number of incumbrances which had been created on the property, uncertain, and that such equitable interest was of little value and quite insufficient as a security for the moneys due thereon to the Plaintiff. The bill charged that

the Defendants had made large profits in professional charges out of the leases and mortgages referred to, and that they, under the circumstances, were liable to pay to the Plaintiff the principal moneys and interest due to him; and the Plaintiff prayed that the Defendants might be decreed to pay to him the principal sum of £7000, together with interest, at the rate of 6 per cent. from the day it fell into arrear; or that in default they might be decreed to be liable to pay to him in aid of any deficiency in his securities the sum of £5200, being the value of the premises, which he was improperly induced by the Defendants to give up and abandon, and that in the meantime until the existence of any such deficiency should have been finally ascertained, the Defendants might be decreed to secure to the Plaintiff the payment of such sum of £5200; and that the Defendants might be decreed to indemnify the Plaintiff against all liabilities in respect of the mortgage securities, and particularly against the costs incurred by him in the suit *Randell* v. *Thomas*, and any costs which he might incur as a party to other suits to which he might be properly made a party by reason of the negligent and improper way in which the Defendants had transacted his business; and for costs of the suit. The original bill contained a charge of fraud against the Defendants' firm, and in particular against the Defendant *George Chapman*, but the amended bill did not contain such charge.

In the answers of the Defendants, the Defendant *George Chapman* stated that he usually and principally attended to the matters referred to; and his co-Defendant stated that he had no personal knowledge as to the greater part of the matters; that the letters on the subject of the advances and the securities which passed between the Plaintiff and the Defendant *George Chapman* were private, and not addressed to or intended for the firm; that he was in no instance present at any interview on the subject between the Plaintiff and the Defendant *George Chapman;* and that he was not in any way consulted as to the original advance of any of the sums advanced by the Plaintiff, nor as to the release of any portions of the securities of those advances. The Defendant *George Chapman* further stated, that in consequence of the Plaintiff's desire that he should look out for any good security that would pay him 6 per cent. at least, he wrote the letter of the 25th of

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August, 1862; that the property referred to therein had been previously valued by a surveyor of great experience (according to whose report, which was set forth, and which was submitted to the Plaintiff, in reference to the project of *Richard Thomas*, for laying out and building upon the land held by him under the agreement of February, 1862), the ultimate outlay would probably be from £60,000 to £70,000, and the profit value (such as might safely be depended upon and probably exceeded) of the undertaking when completed would be £27,046; that he explained to the Plaintiff, who was a good man of business, and who understood the explanation, what the nature of the proposed mortgage would be, and expressly told him that the borrower had no legal interest in the land at the time, but only an agreement under which leases would be granted to him when he had erected certain buildings, and that he wished to borrow the Plaintiff's money to enable him to erect such buildings and obtain such leases of them; and that it was intended that the mortgagor should be at liberty to withdraw finished houses from the Plaintiff's security (sufficient being left to secure the Plaintiff's advances), and to raise money by sale or mortgage of the same for the purpose of enabling him to erect further buildings on the land remaining subject to the security, and that he (the Defendant), before he paid the Plaintiff's money to *Richard Thomas*, obtained a further report from the same surveyor, which shewed that the building operations were of not less value than £4000, and might be considered as contributing £1000 towards the profit mentioned in the previous report. The Defendants gave notice to the solicitors of the trustees of the land of the Plaintiff's security, and desired them not to grant any leases to *Richard Thomas*, or his nominees, without notice to them as the Plaintiff's solicitors. They distinctly stated that the Plaintiff was from time to time kept informed of the mode in which the property was being dealt with; that he never raised any question with respect thereto; and that they never permitted any part of the Plaintiff's security to be withdrawn, which, from the first, it was, as he knew, contemplated should be done, without having good reason to believe that the residue thereof, from the forward state of the buildings thereon and the money which had been expended, was a sufficient security for the Plaintiff's advances.

They prepared a draft memorial of the mortgage for registration, and their only object in delaying such registration, as to which they submitted there had been no neglect on their part, was to avoid the necessity of making the Plaintiff a party to every lease or deed affecting the property, and troubling him to execute the same. The Plaintiff was very impatient about the details of business, and desired the Defendants to act for him, and they were satisfied that his interests were secure, as no lease could be granted under the agreement without notice to them, they having given notice of the Plaintiff's mortgage.

They denied that they knew the property, represented as being worth £12,575, was insufficient security for the Plaintiff's £7000. On the contrary, they believed that the same was a good and sufficient security for the loan, and that any subsequent deterioration in the value of the property had arisen from the general stagnation of business consequent on the crisis of 1866, and from other causes over which they could have no control, of which the conduct of the Plaintiff himself was the most important; and the Defendant *George Chapman* stated that the Plaintiff was duly informed of all the sub-lettings, and that he consented to and approved of the same, but that of the leases which were granted in pursuance thereof he was not informed, there being no reason why he should be. He further said that the statements he made, that the property held as security on behalf of the Plaintiff was worth £10,300, were, to the best of his belief, strictly and literally true, and were made under the *bonâ fide* belief in their truth, guided as they were by the opinions of surveyors and solicitors of much greater experience than himself, and the facts that the building scheme had been carried on with remarkable rapidity, as much as £90,000 having been laid out upon it; sales and lettings having proceeded with great readiness, and several persons and companies having treated to buy up and consolidate all the mortgages; and he believed that the stoppage of the works, and the subsequent vast deterioration in the value of the property, were circumstances that would not have been anticipated by the most prudent and far-seeing person. He denied that he made any statements intended to deceive the Plaintiff, and as to the documents in reference to the property mortgaged to Lady *Hoghton*, and settled on the

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Plaintiff's behalf by Mr. *Rawlinson*—who, on the 7th of August, 1865, wrote to the Plaintiff, stating, "I have just settled a draft of a deed on your behalf, and I write a line at *George Chapman's* request to say that, although it makes you part with a portion of your security, you may, with practical safety, execute it. There is a very ample margin for you now the houses are built. There was a nasty question which arose as to three houses to which Lady *Hoghton* laid claim. If there had been a fight, you must have come out well; but that was to be avoided at all events, and I advised that the question should be settled, and that one house should be taken by Lady *Hoghton* and that two should be given up to you. This has been agreed to. The deed by which the two will be given up to you has not yet been completed, but I have made it a *sine quâ non* that the deed you are now asked to execute should not be handed over until the other is completed. *G. C.* has been through the figures of the value of the security you hold. He puts them at £15,000, which I think fair, but deducting one-fifth for overvalue, you would still have £12,000 as security for £8,000;" to which letter the Plaintiff, on the 10th of August, replied, stating that it made his mind quite easy about signing the deed which he received from *George Chapman* that morning, and which had been returned to him properly executed—he asserted that the Plaintiff executed it of his own free will, not making any objection before or at the time of doing so that a fresh valuation had not been made, nor of his want of information respecting the value of the property; and that he gave up a very valuable part of his security, which he was in no way bound to do; and both the Defendants stated that it was to avoid a dispute in reference to a claim raised by the solicitor of Lady *Hoghton* that the Plaintiff, acting upon the advice of Mr. *Rawlinson,* agreed to give up his claim to this property, it being considered that his security was sufficient without the premises so given up. They further said that a fresh valuation of the Plaintiff's securities was prepared on his behalf, as suggested by Mr. *Rawlinson;* that leases had been assigned to *Richard Thomas,* and had thereby become directly subject to the Plaintiff's mortgage, and that the Plaintiff was in possession of the leases of two of the houses, and of certain coach-houses and stables; and they believed that if the property was

judiciously and gradually realized it would bring back to the Plaintiff everything that he could claim; but that the course adopted by the Plaintiff had been very much against his own interest, inasmuch as he had given a notice to the solicitors of the trustees of the land not to grant any leases of ground comprised in his security, and another notice not to grant leases to a builder who had completed several houses under an agreement, made with his approval, with *Richard Thomas;* and further, that these notices were persisted in, notwithstanding the solicitors of the trustees pointed out that they were injurious to himself; and therefore they submitted whether what might be objectionable in the present state of things was or was not the result of the dealings by them, or by *Richard Thomas* with their sanction, with the premises comprised in the building agreements, or of the Plaintiff's dealings with them under the advice he had received since they acted for him. They denied that they made large profits in professional costs, the aggregate amount, including a large proportion of money paid out of pocket, against *Richard Thomas,* from October, 1862, to the date of his bankruptcy, when he employed other solicitors, not exceeding £782. They submitted that the suit was, at least, premature and improper, and that the Plaintiff's remedy, if any, in respect of the matter complained of, was at law and not in equity.

The evidence of the Plaintiff was, that in executing the deed in reference to the property re-leased to Lady *Hoghton,* he acted in the belief that what had been required by Mr. *Rawlinson* and had been promised by the Defendant *George Chapman,* had been complied with; but that in fact it had not been; and the evidence on his behalf showed that in September, 1869, there was due to him for principal and interest, on the security of the two building agreements, the sum of £8063 5*s.* 10*d.*, which sum did not include certain costs, the amount of which was considerable, incurred by him in certain suits in respect of the property comprised in his mortgage securities.

The evidence as to the value of the property comprised in the Plaintiff's securities was conflicting. On the part of the Plaintiff the reports of surveyors and valuers shewed that the value of this property was in September, 1869, about £3500; while on the part of the Defendants it was deposed that the property comprised in

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the Plaintiff's securities was of very considerable value, and that the vacant land, if it had been judiciously managed, could have been readily let some time ago at a large profit; and in the view of the Court the evidence on their part shewed that there was no reason to doubt that the advice which they gave, founded, as it was, on the reports made to them by surveyors, and communicated to the Plaintiff, was honest.

Mr. *Dickinson*, Q.C., and Mr. *Caldecott*, for the Plaintiff:—

The position of the parties in this case is peculiar. It was clearly the interest of the Defendants that the scheme of Mr. *Thomas* should not fail, as their profits depended upon its success. The original valuation, if made at all, was made on behalf of the mortgagor. The Defendants ought to prove that which the evidence does not do, that the security was, in August, 1862, worth £6000; that the valuation was an independent one, and that the loan of the Plaintiff was only up to one-half of the value of the security. The Plaintiff did not at all understand the nature of the transaction. The Defendants led him into making the loan, and they, as his solicitors, undertook to manage his securities—the exclusive management of them; and their duty was to see that they were always sufficient in point of value, and realizable in point of quality. On the promises made to the Plaintiff he put himself into the hands of the Defendants, and he relied upon their protection and representations. The Defendants dealt with the Plaintiff's securities negligently, and in serving *Thomas's* interests they necessarily served their own. Lady *Hoghton's* case clearly shewed the measure of loss sustained in respect of that property. As to the first £3000, the Defendants are clearly liable, and ought to be decreed to repay that sum, independently of every other question, because they promised not to part with it unless they had a valuation of the property; and upon the whole, as the Plaintiff's securities were so mismanaged by the Defendants, particularly in the way in which he was induced to give up property to Lady *Hoghton* without the conditions promised by the Defendants being performed, and as the securities never were, and are not, of sufficient value, and are not realizable, and the arrears of interest are accruing, the Defendants ought—as all this loss has been occa-

sioned by their misconduct—by their want of skill and care, to be made liable according to the terms of the prayer, or they ought to take the securities and repay to the Plaintiff all the moneys owing to him upon them.

[They cited *Craig* v. *Watson* (1), *Smith* v. *Pococke* (2), and *Dixon* v. *Wilkinson* (3).]

Mr. *Wickens*, and Mr. *W. Barber*, for the Defendants:—

This Plaintiff seeks equitable relief against his solicitors, but no Plaintiff can sustain a bill for a sum of money as for damages. The Plaintiff further asks the Court to compel his solicitors to take off his hands the securities for his loan, on the ground that they are not sufficient for the money invested. It is not the practice of this Court to entertain an action for damages in the form of a suit, and certainly not in the form of one framed as this is. To entitle himself to relief the Plaintiff must make out a very special case; but the allegations in the bill are not true conclusions of the conduct of the Defendants. It may be that the Court has jurisdiction in cases of gross negligence of duty amounting to fraud, and which negligence the Court might say deserved the same species of punishment as for fraud, but such jurisdiction can scarcely be exercised in consequence of the extreme difficulty in giving proper relief—in framing a decree which is not like a verdict in an action for damages. The Plaintiff asks for a decree that the Defendants shall be compelled to take his securities, which they never contracted to take, upon the terms of their repaying the whole amount of his debt; and there is relief prayed which cannot be given without the greatest possible injustice to the Defendants. The securities were speculative, the Plaintiff desiring a larger interest than he could ordinarily obtain. He was fully alive to the nature of the securities he was taking, and he knew how difficult it was to speak of their value. Having been unfortunate he attempts to make out that there was a guarantee in the representations made to the Plaintiff, but this attempt must fail. The Plaintiff was perfectly well informed by letters and documents of withdrawals of large portions of the property from his securities;

(1) 8 Beav. 427. (2) 2 Drew. 197.
(3) 4 De G. & J. 508.

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that, however, became immaterial when it was known to the Plaintiff that the property remaining was more than sufficient security. He knew well that his money was to be advanced upon the security of property which was to be built upon bit by bit. The property was at one time very valuable, and though the Plaintiff has, by his conduct, made it as little attractive to builders as possible—in fact he has driven them away and put the property in an unmarketable condition—yet it still remains, or at least more remains than is sufficient to repay him. This disposes of the case upon which the bill was filed. Then as to the transaction with Lady *Hoghton*. The Plaintiff, in 1865, having become dissatisfied, consulted a friend, a gentleman very competent to advise him, and having acted upon his friend's advice he cannot now ask the Court to make the Defendants responsible for any loss which he may have sustained, or which he may eventually suffer. The case of *Craig* v. *Watson* (1) is distinguishable from this, as there the property was ascertained, but here it was of a speculative character. But upon the authority of *Frankland* v. *Lucas* (2) the Plaintiff has in no point at all—there having been on the part of the Defendants no gross misconduct—made out a case for the intervention of this Court, and looking at the charges made against the Defendants the bill ought to be dismissed with costs.

Mr. *Dickinson* in reply:—

It has been argued that the case made by the bill rests upon fraud, which the evidence does not sustain, and that therefore the case fails. That is not the doctrine of the Court. If there be a good case for relief in the bill the Plaintiff is entitled to it, though charges of fraud have been introduced and not substantiated.

[The VICE CHANCELLOR:—If you satisfy me that there has been gross negligence the Plaintiff is entitled to relief. I have no doubt about the jurisdiction of this Court.]

Then has there not been gross negligence on the part of the Defendants in the advice which they gave to the Plaintiff? Allowing

(1) 8 Beav. 427. (2) 4 Sim. 586.

so much property to be withdrawn was certainly a breach of duty; and assuming that the security was one of a speculative character an additional duty was cast upon the Defendants to see that the Plaintiff's money was properly secured. The case is stronger against the Defendants from that fact, than if the property had been of an ordinary character. Further, permitting money of a client to continue upon an insufficient security, especially where solicitors have undertaken to see that it is sufficient, if the security turns out to be bad, is just as great negligence as if there had been negligence in the original transaction. The letter of the 25th of August, 1862, shows that it never was the intention that the loan should be made upon a vacant piece of land. The original transaction taints the whole of the Defendants' proceedings; they have never shown that the property was in August, 1862, worth £6000. The Plaintiff lent his £3000 upon that representation of value—an amount double that which he advanced; and even if the Defendants did inform the Plaintiff that houses had been withdrawn from his security, still it was their duty to see that there was always sufficient security left. There was a representation made to the Plaintiff of that which was not a fact. The Defendants knew it, and if upon such a representation money was advanced, they are responsible for the injury inflicted upon the Plaintiff; and although there may have been no fraud or wilful intention to deceive, yet there was gross negligence. As the evidence clearly shews that the Plaintiff, whatever may be the possibility of his obtaining repayment in full at a future time, has at present a very insufficient security, he is entitled to relief in the terms of the prayer of his bill.

Jan. 20. SIR J. STUART, V.C.:—

In this suit the Plaintiff asks the decree of the Court against the Defendants, who acted as his solicitors in a mortgage transaction, and he prays that they may be compelled to repay to him the mortgage money of £7000, with interest at the rate of £6 per cent. per annum.

This relief is sought on the ground of neglect of duty as to the securities on which the Plaintiff advanced his money. There is

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alternative relief prayed as to a sum of £5200, for which it is sought to make the Defendants liable in aid of any deficiency resulting from the abandonment of certain property included in the Plaintiff's mortgage, and said to be abandoned by him in consequence of the improper advice of Defendants. The Plaintiff asks to be indemnified generally in respect of the mortgage securities, and the costs of suits to which he may properly be made a party by reason of the alleged negligent and improper way in which the Plaintiff's business was transacted. It is admitted at the bar that the Plaintiff can only be entitled to relief on the footing of his assigning to the Defendants the securities which he still holds. There seems to me to be no ground for disputing the jurisdiction of the Court. Although an action at law may be sustained and damages recovered against a solicitor for loss occasioned by negligence in the discharge of his duty, this Court in a proper case would give relief without sending the injured client to a court of law. Under its improved course of practice it would seem to be the duty of this Court to extend its jurisdiction as far as possible in such cases, and to take cognizance of all well-grounded complaints against the conduct of its officers in the management of the business of their clients, either on bill filed or under its summary jurisdiction. Even before the statute of 1852 the authorities support the right to relief. It is to be observed that the judgment of the Vice-Chancellor in the case of *Frankland* v. *Lucas* (1) does not justify the statement in the marginal note of the reporter.

In the present case the grounds of complaint are greatly overstated, and the nature of the security so peculiar, and the present position and value of the existing securities so entirely uncertain as to any ultimate loss, that even if there were stronger evidence in support of the Plaintiff's case it would be difficult to support the bill.

No actual loss has yet been incurred by the Plaintiff, except the non-payment of interest for some time, and the uncertainty when it may be paid. The land is at present unproductive, and must remain so till building operations are resumed. But it was perfectly understood by the Plaintiff that the value of the security

(1) 4 Sim. 587.

depended on the building operations, and was, therefore, necessarily a precarious value.

Upon the evidence it is impossible to say that it is certain that the Plaintiff will ultimately sustain any loss at all, beyond the loss and inconvenience from delay as to the interest.

There is no precedent, so far as I know, of a decree declaring generally that the Plaintiff in such a case should be indemnified in respect of an apprehended loss which may never occur. And there is a serious difficulty in forcing upon the Defendants the assignment of a security of so peculiar a kind which they never contracted to take.

This is not like the case of *Craig* v. *Watson* (1), where the solicitor took the security in his own name, and the Court was able to direct a sale so as to ascertain with certainty the amount of the loss. In that case gross negligence was proved, and there was nothing peculiar in the nature of the property. The Defendants' conduct has been imprudent rather than negligent. The imprudence was as to a matter on which any man of sense could form an opinion for himself, and a matter which required no professional skill to guide the Plaintiff's judgment.

It is the peculiar nature of the security which has occasioned the complaint. A lease of land for building purposes is of no productive value until the expenditure for erecting the buildings is made, and the object of the borrower is to get the money to enable buildings to be erected. It is not attempted to put the Plaintiff's case upon the ground that the Defendants ought not to have lent his money on such a security. The amount lent by the Plaintiff was inconsiderable, compared with the amount necessary for the contemplated buildings, and the nature of the security was such that from the beginning it was contemplated that houses as they were completed, might, with the consent of the Plaintiff, be withdrawn from the security. It is no part of the complaint against the Defendants that they were negligent in not having a definite stipulation as to the number to be withdrawn. On the contrary, the Plaintiff perfectly understood the nature of the contract, and knew that the number of houses which might be withdrawn was undefined, and was therefore for future arrange-

(1) 8 Beav. 427.

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ment. The Plaintiff was fully informed and consulted, and had the same means of forming an opinion, and of obtaining the information necessary for forming an opinion, as the Defendants.

In a question between solicitor and client as to loss from negligence, there must be negligence of a gross and palpable kind to give a right to relief. But where, as in this case, the conduct complained of is more properly to be described as imprudent or indiscreet, than as negligent, and every transaction was referred to the judgment of the client himself, who concurred in it, there seems to me to be no right to equitable relief. The advice which the Defendants gave was founded on the reports of surveyors communicated to the Plaintiff, and whatever may be said of the prudence or imprudence of the course advised by the Defendants, I can see no reason to doubt the honesty of the advice. It was upon a matter which did not require professional skill; and the grounds upon which the advice was given were submitted to the Plaintiff's judgment, and approved by him. That is as to the general case of the Plaintiff.

As to the transaction with Lady *Hoghton*, the principal ground of complaint is, that no valuation of the property was made according to the suggestion of Mr. *Rawlinson*. But it is proved that a valuation was made, although not communicated to the Plaintiff. The letter of Mr. *Rawlinson* to the Plaintiff, dated the 7th of August, 1865, seems to me conclusive against the Plaintiff as to the whole transaction with Lady *Hoghton*. In his second affidavit the Plaintiff is obliged to admit that one allegation in the bill is incorrect, and that at the meeting on the 25th of May, 1865, nothing passed as to any question between himself and Lady *Hoghton*. There seems to me no just ground for the allegation that the execution by the Plaintiff of the deed of the 9th of August, 1865, was improperly obtained.

It is unfortunate for the Plaintiff that he should have been induced to charge fraud against the Defendants in the original bill. Even in the amended bill, in which the charges of fraud are struck out, there remains the imputation of improper motives as influencing the Defendants in the advice which they gave to the Plaintiff.

There is nothing in the evidence to justify these charges, and as

the Plaintiff has failed to shew any sufficient ground for the relief which he asks, the bill must be dismissed with costs.

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Solicitors for the Plaintiff: Messrs. *Walters, Young, Walters, & Deverell.*

Solicitors for the Defendants: Messrs. *Chapman, Clarke, & Turner.*

BOURTON *v.* WILLIAMS.

V.-C. S. 1870 Jan. 27.

Mortgagor and Mortgagee—7 Geo. 2, c. 20—Action at Law—Payment of Mortgage Debt into Court of Exchequer—Liability of Mortgagor not discharged.

The liability of a mortgagor who has been sued in an action at law, and who has, under the provisions of the statute 7 Geo. 2, c. 20, paid the principal and interest due on the mortgage into Court, continues until he has seen that the money has been properly paid out, and obtained from the Court an order of discharge.

Rest 5th. 655.

THIS was a plaint instituted in the County Court of *Oxfordshire,* and transferred to this Court.

On the 3rd of May, 1858, *Alice Matthews,* who, in January, 1860, intermarried with *James Carr,* lent to *James Williams* a sum of £200 on a mortgage of freehold lands.

Upon the marriage of Mr. and Mrs. *Carr* a settlement was prepared by his solicitor, but it did not include the £200 so lent to *James Williams.* In March, 1860, Mr. and Mrs. *Carr* separated, and never afterwards lived together.

Shortly after the separation *James Carr,* in the names of himself and his wife, brought an action against *James Williams* to recover the £200 and interest due, but the wife gave notice to *James Williams* that the action was brought against her consent, that the £200 ought to have been in the settlement, and that she would be no party to a reconveyance of the lands to him if he paid the money to her husband. *James Williams* then, under the statute 7 Geo. 2, c. 20, s. 1 (1), applied for and obtained an order

(1) Section 1 of the Act enacts as follows:—"Where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of the Courts of Record at Westminster . . .

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from Mr. Baron *Channell* that on payment into the Court of Exchequer by him of the sum of £200, with £6 12*s.* interest due, and the payment of costs, all further proceedings in the action should be stayed, and that the Plaintiffs and all necessary parties should thereupon execute a proper reconveyance at the expense of *James Williams*, and that upon payment to the Plaintiffs or their attorney of such further sum as might be due for interest, the Plaintiffs should deliver to *James Williams* such reconveyance, and that whereupon the sum of £206 12*s.* should be paid out of Court to the Plaintiffs or their attorney.

James Williams, in July, 1860, paid the £206 12*s.* into the Court of Exchequer. The reconveyance ordered was not executed, but *James Carr* and *James Williams* agreed that the former should receive the money out of Court upon condition that he paid £100 to the latter for him to hold for Mrs. *Carr*, and to pay to her on her executing a reconveyance.

James Carr signed a document purporting to be a transfer of the mortgage, and he also, by the direction of *James Williams*,

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by any mortgagee, his heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of the Courts of Equity in England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments; if the person having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become Defendant in such action, shall at any time pending such action pay unto the mortgagee, or in case of his refusal shall bring into Court where such action shall be depending, all the principal moneys and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest, and costs, to be ascertained and computed by the Court where such action is or shall be depending), the moneys so paid to such mortgagee, or brought into such Court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge veery such mortgagor or defendant of and from the same accordingly; and shall and may by rule of the same Court compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender, or reconvey, such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee hath therein, and deliver up all deeds, evidences, and writings in his custody relating to the title of such mortgaged lands, tenements, and hereditaments, unto such mortgagor who shall have paid or brought such moneys into the Court, his heirs, executors, or administrators, or to such other person as he shall for that purpose nominate and appoint.

delivered to *J. Williams'* solicitor (Mr. *A. G. Holmes*), by whom the £206 12*s.* had in fact been provided, such document and the title deeds of the lands. Thereupon, by consent of *James Williams*, *James Carr*, or his attorney, received the money out of Court, and immediately returned to Mr. *Holmes* £100, less the sum of £17, which was deducted by *James Carr's* attorney for costs. Mrs. *Carr* declined to accept the £83, but she expressed her willingness to accept £100, and she refused to, and never did execute any reconveyance.

James Carr died on the 6th of June, 1866, and Mrs. *Carr* died on the 23rd of July following, having appointed the Plaintiffs her executors, to whom she devised the legal estate in the mortgaged lands, who applied to *James Williams* for payment of the £100 and interest, or at least for £83 and interest. Mr. *Holmes*, the solicitor of *Williams*, and the person who supplied the money paid into Court, died on the 22nd of July, 1863, having appointed his wife, a Defendant, his executrix, and she claimed to retain the deeds in her possession as equitable mortgagee for securing payment of the moneys due to her by *James Williams*. The Plaintiffs prayed that the Defendants, or one of them, might be ordered to pay the £200, or so much thereof as the Court might be of opinion was due to the Plaintiffs, with interest; and in default thereof that they might be foreclosed.

James Williams deposed that the attorney of *James Carr* and his wife really received the money out of the Court of Exchequer, and that the £83 was paid into the hands of Mr. *Holmes*, who retained it in trust for Mrs. *Carr*, and it appeared that in 1865 *James Carr* brought an action against Mrs. *Holmes* to recover the £83, but was not successful. Mrs. *Holmes'* costs were taxed at £18 16*s.* as against *James Carr*, but she could not recover that sum from him, and her further costs were £23 7*s.* 8*d.*, and she claimed to deduct both sums from the £83. *James Williams* also deposed that *James Carr* agreed to execute to his attorney an assignment of the mortgage debt for securing a sum not exceeding £215 8*s.* 2*d.*, with interest, and authorized him to give receipts in his name for the moneys due on the mortgage, which should be sufficient discharges to *James Williams* for the same; and that the attorney gave him notice in writing of such equitable assignment.

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After the transfer of the plaint the Plaintiffs offered to accept £100, interest, and costs.

Mr. *Dickinson*, Q.C., and Mr. *Phear*, for the Plaintiffs:—

Mrs. *Carr* was no party to the arrangement between her husband and *James Williams*, whose object was not to obtain, as he might probably have done, had he wished it, his discharge under the statute from the debt, but to keep alive the debt, and to have a transfer made of it to Mr. *Holmes* as a substituted mortgagee. Mrs. *Carr* never received any part of the money, or of the £100, which it appears she would have been satisfied with. The money was not left in Court to be disposed of under the statute, and *Williams*, who does not pursue the course pointed out by the statute, but who concurred in the payment out of Court, has never obtained any order under it from the Court discharging him from the debt, and therefore he is still liable for what may be considered owing to the Plaintiffs. The statute, in fact, is not applicable to this case, as more than mere payment into Court is contemplated by it. The Plaintiffs, who have in them the legal estate, are clearly entitled to a decree.

Mr. *Bristowe*, Q.C., and Mr. *Fischer*, for the Defendants:—

It is perfectly manifest that the order made in the action was a complete discharge under the statute. The money was paid into Court to secure the mortgagor against loss — the husband and wife having quarrelled—and he only consented to its being paid out when he believed the husband and wife had come to an arrangement. The suit ought to be dismissed with costs.

SIR JOHN STUART, V.C.:—

The Defendant, *James Williams*, paid the money into Court under a judge's order, made under the statute, and that was a payment, according to the statute, in satisfaction of the debt; but the order under which he paid the money into Court did not discharge the debtor, as the statute provided it might have done, and no order has ever been made which has discharged him from seeing that the money was properly paid out of Court. After paying the money into Court, the Defendant *Williams* might have

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opposed any payment of it out unless on the terms that he was to be discharged by the Court from the debt. But he took a different course. He consented to a complicated arrangement, under which the money was paid out of Court, but to that arrangement Mrs. *Carr* was no party, and it did not affect her rights. The legal estate remains in Mrs. *Carr's* representatives, and it is impossible to hold that they have not a lien on it to the extent of £100, or that they are bound to reconvey the estate until that sum has been paid to them.

MINUTES.—Order *James Williams* and *Julia Holmes*, within six months after taxation, to pay to the Plaintiffs £100, with interest and costs of suit, including costs properly incurred under the indenture of the 3rd of May, 1858, and the costs in the County Court, the total amount to be paid to be certified by the Taxing Master; and upon such payment order Plaintiffs to reconvey; and in default of payment order Defendants to hand over the deeds to the Plaintiffs, and stand foreclosed. Liberty to apply.

Solicitors: Mr. *Charles Mallam*, agent for Messrs. *T. & G. Mallam, Oxford;* Messrs. *Singleton & Tattershall*, agents for Mr. *J. N. Clayton, Oxford.*

WALLINGER *v.* WALLINGER.

V.-C. S. 1869 *Dec.* 13, 20.

Will—Defective Appointment—Residuary Appointment of Non-appointed Part —Election.

The donee of an exclusive power to appoint to her children, appointed to trustees upon trust during the life of her son *J.* to apply at discretion the whole or any part of the income for the benefit of *J.* or his children, and subject thereto upon trust for *J.'s* children as *J.* should appoint, and in default for her daughter *A.*, and after giving legacies appointed her property not thereinbefore appointed to *A.*:—

Held, that the whole was well appointed to *A.*, and that no case of election could arise.

SERJEANT *WALLINGER*, by his will, dated the 15th of August, 1858, after appointing his wife sole executrix, and giving certain specific bequests and legacies, made the following disposition:—"Subject to the payment of my debts and funeral and testamentary expenses, I bequeath all the residue of my property and personal estate unto my brother, the Rev. *W. Wallinger*, and

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nephew *C. J. Fisher*, to receive the produce of the same and pay it over to my said wife during her life, and on her decease to pay the *corpus* or principal to and among my children as she shall by will or by deed, executed in the presence of two witnesses, direct and appoint from time to time, and in such shares and proportions, and whether to one only or to some or all, as she directs, and in default of appointment then to my children equally."

The testator died on the 4th of April, 1860, leaving four children him surviving, viz., *Henry A. Wallinger*, who died intestate on the 12th of June, 1864, and *J. N. A. Wallinger*, *A. C. Wallinger*, and *Amelia Anne Wallinger*. The will was proved by the executors on the 22nd of May, 1864.

The testator's widow made her will, dated the 24th of May, 1867, declaring it to be made in pursuance of every power, authority, direction, estate, or interest, in anywise enabling her in that behalf, and of which she appointed the said *Amelia Anne Wallinger* and *C. J. Fisher* executrix and executor. She then appointed and bequeathed certain shares, forming part of the property, given by the will of Serjeant *Wallinger*, and described by her as held by "my trustees for me, or on my behalf," and the moneys or securities which should at her decease represent them, to her daughter, the said *Amelia Anne Wallinger*, and *C. J. Fisher*, thereinafter called her trustees, upon trust, in the absolute discretion of her trustees, to continue or change the existing investments, and with the consent of her son *James Wallinger*, to change and reinvest the moneys in certain specified securities; and upon trust during the life of her son, the said *James Wallinger*, to pay and apply at such times and in such manner as her trustees in their absolute and irresponsible discretion should deem proper, and so as not to impose on them at law or in equity any trust or obligation with reference to the exercise of such discretion, the whole or such parts as they should think fit, of the annual income of the aforesaid investments, for the personal support, use, or benefit of the said *J. Wallinger* or his child or children, by his first and second marriage only, or any or either of such children; and, subject to the trusts aforesaid, to hold the moneys thereinbefore appointed and bequeathed, and the securities for the same, and the annual income thereof, in trust for all or any of the child or

children of her son *James*, by his first and second marriage only, or any or either of such children, for such interests, in such proportions and in such manner in all respects, as her said son should by will appoint, and in default of such appointment, in trust for the said *Amelia Anne Wallinger* absolutely, and after giving certain legacies she proceeded as follows:—

"And I appoint, devise, and bequeath all my real and personal estate not hereinbefore specifically and absolutely appointed or bequeathed, unto and to the use of my said daughter *Amelia Anne Wallinger* absolutely, for her own sole and separate use."

The testatrix died on the 17th of January, 1869.

James N. A. Wallinger, called by the testatrix her son *James*, had seven children by his first and second marriages. The bill was filed by *Amelia Anne Wallinger*.

Mr. *Dickinson*, Q.C., and Mr. *C. Hall*, for the Plaintiff:—

It is not denied that the appointment to the children of *James* is not within the power, and is therefore void. If so, the language of the testatrix in the last clause of the will is sufficient to carry the whole property, and the Plaintiff is therefore well entitled.

Mr. *Karslake*, Q.C., and Mr. *Dumergue*, for *A. C. Wallinger*, a son of the testator, and a lunatic:—

Where a gift is void, the gift in default is also void: *In re Brown's Trusts* (1). The power here is a limited one, and the words in the residuary gift, "specifically and absolutely," refer to the bad appointment: *Moss* v. *Harter* (2), is an authority to shew that the property comprised in the bad appointment cannot be held to be included in the residuary clause.

All the property subject to the power is pure personal estate, and stronger words of reference are therefore necessary in order to include it: *Sugden* on Powers (3). The use of the word "appoint" is not of itself sufficient evidence of the testatrix's intention to execute the power by the residuary gift: *Hope* v. *Hope* (4), cited in *Sugden* on Powers (5); *Clogstoun* v. *Walcott* (6).

(1) Law Rep. 1 Eq. 74.
(2) 2 Sm. & Giff. 458.
(3) 8th Ed. 317, 318, 320.
(4) 18 Jur. 823.
(5) 8th Ed. 294.
(6) 13 Sim. 523.

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Again, the use of the word "my," shews she thought she was dealing with her own property, inasmuch as she had first affected to dispose of part of the property which was subject to the particular power given by her husband's will, and then when she gave legacies it is reasonably to be inferred that she was dealing with her own property, on which the residuary clause might operate: *Jones* v. *Curry* (1); *Evans* v. *Evans* (2).

Mere suspicion that the testatrix meant to exercise the power is insufficient. There must be clear reference to the subject matter: *Ex parte Caswell* (3); *Andrews* v. *Emmot* (4); *Bennett* v. *Aburrow* (5).

[As to the appointment being bad, they cited *Routledge* v. *Dorril* (6); *In re Brown's Trusts* (7).]

Mr. *Greene*, Q.C., and Mr. *Waller*, for *James N. A. Wallinger*:—

The appointment to the Plaintiff is in default of appointment by *James*, and is coupled with a gift to *James's* issue. The testatrix cannot be presumed to have intended in the residuary clause to have treated the appointment referred to as bad. The intention would be best effectuated by holding that the words amounted to an appointment to *James*.

Mr. *Freeman* for the children of *James N. A Wallinger*:—

It is clear that the testatrix intended to appoint under the power in favour of the infant children of *James*; it is equally clear that she gave to her daughter, the Plaintiff, who was an object of the power, benefits out of her own property. This, therefore, puts the Plaintiff to her election: *Whistler* v. *Webster* (8); *Jarman* on Wills (9); *Sugden* on Powers (10).

Mr. *Humphry*, appeared for the trustee.

Mr. *Dickinson*, in reply:—

The construction must be ascertained by the intention apparent on the instrument: *Churchill* v. *Churchill* (11); *Wollaston* v.

(1) 1 Sw. 66–72.
(2) 23 Beav. 1.
(3) 1 Atk. 559.
(4) 2 Bro. C. C. 297.
(5) 8 Ves. 609.
(6) 2 Ves. 357.
(7) Law Rep. 1 Eq. 74.
(8) 2 Ves. 367.
(9) 3rd Ed. 417.
(10) 8th Ed. 579.
(11) Law Rep. 5 Eq. 44.

King (1). It is quite clear that the testatrix intended to appoint everything that remained unappointed to the Plaintiff.

SIR JOHN STUART, V.C.:—

No doubt there is a degree of difficulty in this question. Putting the fair construction upon the ultimate words of absolute appointment of all that had not been specifically appointed, it seems to me impossible to say that this lady left unappointed any part of the property over which she had power. There is no doubt about the principles which govern the case. This, like every question on the validity of appointments, depends upon the intention. Here there is room for the argument that this lady, having appointed to *James* and his children certain specific parts of the property, the natural construction would be, that when she came to appoint or dispose of the rest of her property she could not intend either to dispose of or appoint what she had previously appointed in terms; because it cannot be contended that the words about ultimate appointment of all that had not been before appointed could be so general as to include everything, whether previously well appointed or ill appointed. What was well appointed it could not include; what was ill appointed it must include, if the words are absolute and universal; and my opinion is that the words are absolute and universal. It is impossible to say that the child *Amelia Anne* is not absolutely entitled to the whole of the appointed property. As to the argument of election, it proceeds upon a misapprehension of the principles on which the case of *Whistler* v. *Webster* (2) was decided. Here nothing is left unappointed, nothing is claimed in default of appointment, and there is no room for raising a question of election.

Upon the whole, therefore, the declaration of the Court must be that the whole of the property is absolutely appointed to *Amelia Anne*.

Solicitors for the Plaintiff: Messrs. *R. M. & F. Lowe.*

Solicitors for the Defendants: Mr. *R. D. Hughes;* Mr. *F. H. Turner.*

(1) Law Rep. 8 Eq. 165.

(2) 2 Ves. 367, 370.

V.-C. M.
1870
Jan. 21, 28.

In re NATIONAL PROVINCIAL LIFE ASSURANCE SOCIETY.

Novation of Contract—Policy of Assurance—Annuity—Transfer of Business by one Life Assurance Office to another—Payment to new Office of Premiums on Policy effected with old Office—Receipt from new Office of Annuity granted by old Office.

Post 321
5 Ch 393 n.
Post 646, 7 9
5 Ch D 260

The holder of a life policy of assurance, having notice that the *N.* assurance office, with which the policy was effected, had transferred its business and assets to the *A.* assurance office, and had ceased to carry on business, paid the premiums on his policy to the *A.* office for thirteen years, and upon the dropping of the life sent in a claim upon the policy to the *A.* office:—

Held, that there had been complete novation of the contract, and that the *N.* office was released from liability on the policy.

The holder of an annuity granted by the *N.* office, having notice of the transfer, received his annuity for thirteen years from the *A.* office:—

Held, on the authority of *In re Family Endowment Society* (1), that there had been no novation of the contract, and that the *N.* office remained liable for the annuity.

THESE were two Petitions for the winding up of the *National Provincial Life Assurance Society.*

The *Society* was incorporated under the 7 & 8 Vict. c. 110, and was registered on the 18th of July, 1851. In August, 1856, the *Society* transferred its business and assets, and purported to transfer its liabilities, to an association, which was provisionally, but never completely, registered as a joint stock company, called the *Bank of London and National Provincial Insurance Association,* and from that time the *Society* ceased to carry on business.

In October, 1858, the *Association* transferred its business and assets to the *Albert Life Assurance Company,* the *Albert* taking upon itself the liabilities of the *Association,* and from that time the *Association* ceased to carry on business.

The *Albert Company* carried on business until August, 1869, when it stopped payment, and on the 17th of September, 1869, it was ordered to be wound up by the Court.

The first Petition was presented by *William Fleming,* the holder of a policy of the *Society* for £1000, on the life of *Christopher George Carroll,* effected by *Carroll,* in October, 1855, and assigned

(1) Law Rep. 5 Ch. 118.

to *Fleming*, in February, 1856. The policy was on the terms of participation in profits, and the premiums (£25 10*s.* 10*d.*) were payable half-yearly to the directors of the *Society* for the time being, at the office of the *Society*, and the policy contained the usual proviso that the capital stock, funds, and corporate property of the *Society* should alone be charged and liable under it, and the shareholders should not be personally liable. *Fleming* knew, though it did not appear that he received formal notice, of the successive transfers of business from the *Society* to the *Association*, and from the *Association* to the *Albert Company*, and he paid the premiums on the policy to the *Association* in 1857 and 1858, and to the *Albert Company* from 1858 until the death of *Carroll*, in June, 1869. The receipts for the premiums given by the *Association* and the *Albert Company*, referred to the number of the policy, but did not mention the name of the *Society*. The *Albert Company*, for two or three years after the transfer to it of the business of the *Association*, was in the habit of issuing a special form of receipt for premiums on policies effected either with the *Society* or with the *Association*, in which the premium was expressed to be received "for the renewal of policy in the *Bank of London* and *National Provincial Insurance Association*," . . . "the liability of the *Bank of London* and *National Provincial Insurance Association*, by reason of the death of the assured under such policy having been taken by the *Albert Life Assurance Company*, subject to the payment to them of all premiums and moneys now or hereafter to become due and payable under the same policy." *Fleming* had lost his receipts for 1859 and 1860, but he stated that he did not remember having received any receipts in the above form, and that he felt certain that he should have rejected any such receipt, as he always looked to the *Society* as liable to him under the policy. In cross-examination he admitted that if the *Albert Company* had not become insolvent he should not have thought of applying to the *Society*, and that he looked to the *Albert Company* as responsible. A bonus on the policy was declared by the *Albert Company* in 1863, and was added to the amount assured in the books of the *Company*, but it did not appear that *Fleming* had notice of it.

In June, 1869, *Fleming* sent in his claim on the policy to the *Albert Company;* on the 15th of July the secretary of the *Albert*

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wrote to say that the *Company* admitted the claim (subject to a claim for reduction of the amount, in consequence of an error as to the age of the assured,) and that the money would be payable on the 11th of October; on the 8th of October *Fleming's* solicitor wrote to the secretary to inquire whether payment would be made on the 11th, and received a reply that all payments were suspended for the present. On the 18th of November he presented his Petition to wind up the *Society*.

The second Petition was presented by *William Kettle*, the holder of an annuity, granted by the *Society* in 1854, in consideration of £400 then paid to the *Society*. *Kettle* received his annuity from the *Society* until 1857, from the *Association* in 1857 and 1858, and from the *Albert Company* from 1858 until it stopped payment. Before presenting this Petition he presented a Petition to wind up the *Association*, but that Petition was dismissed by Vice-Chancellor *James*.

The Petitions were opposed by several shareholders of the *Society* and by the official liquidators of the *Albert Company*, on the ground that the Petitioners had, by respectively paying the premiums on the policy to, and receiving the annuity from, the *Association* and the *Albert Company*, released the *Society* from liability under its contracts with them, and were not creditors of the *Society*; but in the course of the argument the Vice-Chancellor expressed his opinion that as to *Kettle's* Petition, the case could not be distinguished from that of *In re Family Endowment Society* (1), and, thereupon, the opposition to an order on that Petition was not further pressed.

Mr. *Glasse*, Q.C., and Mr. *Wickens*, for *Fleming*:—

The burden is upon the Respondents of proving that *Fleming* has agreed to discharge the *Society* from its contract under the policy, and the sole proof of such agreement which they can produce is the fact of his having paid the premiums to the *Association* and the *Albert Company*. But the *Society*, by transferring its business to the *Association*, had constituted the *Association* and its assignees the agents of the *Society* for the purpose of receiving the premiums on policies granted by the *Society*, and the Petitioner, having notice of the successive transfers of business, paid the

(1) Law Rep. 5 Ch. 118.

premiums to the successive transferees as agents of the *Society*, and did not thereby intend or agree to accept the liability of the *Association* or of the *Company* in substitution for that of the *Society*. The form of receipt given by the *Albert Company* in 1858, 1859, and 1860, will be relied on by the Respondents, but in the first place it is not proved that the Petitioner ever took a receipt in that form; and in the second place, if he did take it, he would only have been informed of the fact that the company had taken upon itself the liabilities of the *Association*, which would not have affected the rights of creditors of the *Association* or of the *Society*. It is said that he was credited with a bonus of the *Albert Company*, but it does not appear that he ever had notice of it, and if he had, the acceptance from the *Albert Company* of a bonus, which the *Society* was bound to pay him, does not discharge the *Society* from its contract under the policy. If it had been intended that the *Society* should be discharged from liability, a new policy would have been granted by the *Albert Company*, or the original policy would have been endorsed with a memorandum of an agreement for substituting the liability of the *Albert Company* for that of the *Society*. It may be that the Petitioner could have maintained a suit to prevent the *Society* from transferring its assets without reserving a fund sufficient to provide for his policy, but he was not bound to institute such a suit, and his omission to do so could not release the *Society* from liability. This case is completely covered by that of *In re Family Endowment Society* (1), for there can be no distinction in principle between the case of a policy-holder who pays his premiums to the transferee company, and that of an annuitant who receives his annuity from the transferee company. In that case both the Vice-Chancellor *James* and the Court of Appeal held that slight circumstances, which may be sufficient to prove novation of contract in the case of creditors of an old firm dealing with the new firm after a change in the partnership, are not sufficient to prove a release from a contract under seal charging the assets of a company.

Mr. *Willcock*, Q.C., and Mr. *Cottrell*, for *Kettle*, relied upon *In re Family Endowment Society*.

(1) Law Rep. 5 Ch. 118.

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Mr. *Pearson*, Q.C., and Mr. *Higgins*, for a shareholder of the *Society* and for the official liquidators of the *Albert Company;* and Mr. *Cotton*, Q.C., and Mr. *Rodwell*, for other shareholders of the *Society*:—

First: In order to establish a claim against the *Society*, *Fleming* must shew that he has paid the premiums to the *Society*. He says that he has paid the premiums to the agents of the *Society*, but the effect of the transaction between the *Society* and the *Association* was, not to make the *Association* agents of the *Society*, but to assign to the *Association* the rights and liabilities of the *Society;* or, if the *Association* were made the agents of the *Society*, that agency could not be delegated to the *Albert Company*. The *Albert* never assumed to act as agents for the *Society*, and did not carry the premiums received on policies of the *Society* to a separate account.

Secondly: *Fleming* has accepted the *Albert Company* as his debtor under the policy in substitution for the *Society*. He knew that the *Society* had ceased to carry on business and had transferred all its property; and though he might, if the transfer were *ultrà vires*, have instituted a suit to prevent the transfer taking place without some provision being made out of the assets for meeting his policy, *Kearns* v. *Leaf* (1), *Bishop* v. *Scott* (2), he made no objection to the transfer, but for thirteen years paid the premiums to the transferees, and upon the death of the assured he applied to the *Albert Company* for payment. It is clear that he looked upon the *Albert* as the party liable to him under the policy, and he admits that if the *Albert* had not stopped payment he would not have thought of applying to the *Society;* even after the winding up of the *Albert* he applied through his solicitor to the *Albert* for payment of his claim. The receipts given by the *Albert* in 1858, 1859, and 1860, which were sent to all the policy-holders, and, therefore, must have been received by *Fleming*, distinctly shewed that the *Albert* had undertaken the liability on the policies of the *Society*, and *Fleming*, if he did not intend to accept the substitution of the *Albert* as his debtor, ought at once to have objected. It would be most inequitable to allow him, after standing by and allowing the *Society* to part with its property, and paying to another

(1) 1 H. & M. 681. (2) 7 L. T. (N.S.) 570.

office the premiums which go to constitute the fund out of which the policy is to be paid, to insist upon the liability of the *Society*, which has parted with its assets and has not received the premiums. The case of a policy-holder is not touched by the decision in *In re Family Endowment Society* (1). In that case the office which contracted to pay the annuity had received the full consideration, but in the case of a policy the office to which the premiums are paid receives the consideration, and the payment of premiums to the new office amounts to a substitution of the liability of the new office for that of the old office. If the Court is satisfied that in the case of *Kettle's* Petition the authority of *In re Family Endowment Society* is conclusive, the proper course will be to make a winding-up order on that Petition only, and either to dismiss *Fleming's* Petition, or to make no order upon it and leave it open to him to bring in his claim under the winding-up. The latter course was adopted under similar circumstances in *In re Medical Invalid and General Life Assurance Society*, before Vice-Chancellor *James*, on the 18th of December, 1869. A winding-up order will not be made upon the Petition of a creditor whose debt is *bonâ fide* disputed: *In re Catholic Publishing and Bookselling Company* (2). [They also cited *Evans* v. *Coventry* (3); *In re Smith, Knight, & Co., Ex parte Gibson* (4)].

Mr. *Glasse*, in reply.

Sir R. Malins, V.C., after stating the facts, continued:—

Now, before I go any further, I may say that this is perfectly clear: that, although this is an office which, as I have just stated, had discontinued its business before this Petition was presented for a period of thirteen years; although Mr. *Kettle*, an annuitant, holding an annuity granted in 1854, had from 1856 ceased to receive his annuity from this office; I am bound by the authority of Vice-Chancellor *James*, confirmed by the Court of Appeal, in the case of the *Family Endowment Society*, to say that, this being identically the same case as that of the *Family Endowment Society*, upon Mr. *Kettle's* Petition there must be the usual order to wind-up,

(1) Law Rep. 5 Ch. 118.
(2) 2 D. J. & S. 116.
(3) 8 D. M. & G. 835.
(4) Law Rep. 4 Ch. 662.

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and that, indeed, is a point which for some time has not been disputed. The only point upon which I have heard the argument, and which I have now to decide, is, whether I must also make the order upon Mr. *Fleming's* Petition; or whether that Petition should be ordered to stand over; or whether I should make no order upon it; or whether I should send Mr. *Fleming's* claim into Chambers to be adjudicated upon as a debt. That is what I have now to decide.

Now, with regard to Mr. *Fleming's* case, I am bound to say, after the argument I have heard, that I think there is a remarkable difference between the position of a person who is the grantee of an annuity, which Mr. *Kettle* is, and a person who is the holder of a policy of assurance. In the case of an annuitant, the grantors, the insurance office, once for all receive the consideration. The consideration for Mr. *Kettle's* annuity was paid to the *National Provincial Assurance Society,* and they undertook the payment of the annuity; and although he has subsequently received his annuity from the *Albert,* it might well be, as Vice-Chancellor *James* and the Lord Chancellor and the Lord Justice considered, that he was at liberty to treat the *Albert* merely as the agent of the original grantors to pay the annuity. But when I look at the position of a policy-holder, it appears to me to be very different. In this case, Mr. *Carroll* originally insured his life in 1855, and the policy was assigned to Mr. *Fleming* so early as February, 1856, more than thirteen years, therefore, before the *Albert* stopped payment, and for all purposes Mr. *Fleming* must be treated as if he had originally effected the policy. It is not denied that Mr. *Fleming* received notice in the year 1856 that the original office in which the assurance was effected intended to discontinue their business, and it is not attempted to be denied that he was perfectly aware that they had ceased to carry on their business as an insurance office, and that they had handed the business over to the *Bank of London Association;* nor is it attempted to be denied that when the *Bank of London Association* in their turn gave up in 1858, he had notice that the business was handed over by them to the *Albert.* From that time downward Mr. *Fleming* has looked to the *Albert* only; to them he has paid his premiums; he has taken receipts from them; and if he had been determined to keep alive

the liability of the *National Provincial Society*, when he was told in 1856 that that *Society*—which was not an old established office that had obtained a great reputation, or great stability—when he was told in 1856 that that office, in which he had paid at the utmost two premiums—it is not like the case of an annuitant who has parted once for all with the whole consideration—was about to discontinue business and hand over its business to another office, I think upon every principle of justice and common sense he was bound to say, "I do not acquiesce in this, I do not like the office to which you are going to hand me over; I will not go to the *Bank of London Association.*" And in the same manner in 1858, he might have said to the *Bank of London Association*, "I will not go over to the *Albert.* You must, before you transfer your business, settle with me. You must give me a policy in another substantial office that I shall be satisfied with. I must be satisfied that the premium will be the same, and provided I get a substantial office it is perfectly immaterial to me what that substantial office is."

It has been argued that it would be absurd to apply to such a case as this the doctrine of this Court, that if a person stands by and sees a particular thing done, or allows persons to act upon the belief that a particular state of things exists, while he knows it does not exist, he is thereby bound; but I am of a contrary opinion. I think it is quite proper that such a principle should be applied to such a case as this. Mr. *Fleming* knew in 1856 that the persons composing this *National Provincial Assurance Society* were about to alter their position; he knew that they were going to act upon the assumption that when they got the policy-holders to go to the other office and pay their premiums, they would thereupon give up business, and cease to be liable for the consequences of having carried on the business. If he did not intend to acquiesce it was his duty to say so. But he did not take that course. Without a word of objection, without remonstrance, he paid his premiums for thirteen years to another office; and does not justice require that he should be considered as having, although not possibly by express contract, yet by silence, acquiescence, and conduct, adopted such a course as binds him to adopt the new office, and to relinquish the liability of the old one? In my

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opinion decidedly it does. If this case were *res integra*, if there had been no decision of the Court of Appeal, I should, with entire satisfaction to my own mind, have come to the conclusion upon this transaction that it would be most inequitable to allow Mr. *Fleming* to resort to the old office after he has for so many years paid his premiums to, and taken receipts from, the new office. The form of receipt issued by the *Albert* twelve years ago, if he received it in that form, told him that it was a premium on the renewed policy of the *Bank of London and National Provincial Life Assurance Association*, and that their liability under the policy had been taken by the *Albert Company*, subject to the payment to the *Albert* of the premiums thereafter to become due. Even if he did not receive that form of receipt, I am of opinion that he has had notice of the fact as distinctly as if he had received the receipt in that form. I believe, however, although it is not proved, that he must have received it, because it is proved that it is the form in which they issued all their receipts. I said, in the course of the argument, that I thought it could not have occurred to Mr. *Fleming's* mind, as a mercantile man, that having adopted this course of conduct for so many years, having clearly shewn by a correspondence after the life dropped that he looked only to the *Albert*, and that after the winding-up order was made he still looked to the *Albert*, he could still retain the liability of the original office. It is perfectly clear that this suggestion of applying to the old office was not a suggestion of his own mind, but the suggestion of some legal mind conversant with these matters. No doubt the Petition was presented in consequence of the decision in the case of the *Family Endowment Society* (1); but it raises a very material question whether the position of a policy-holder is precisely the same as that of an annuitant. I am of opinion that it is not the same; and therefore, unless I am bound by the decision of the Court of Appeal, I should certainly, as I have already said, come to the conclusion unhesitatingly that there is in this case novation of contract, and that Mr. *Fleming* is bound to resort to the assets of the *Albert Company* only. I feel however great reluctance in deciding that point as I should do in my own judgment, in consequence of the decision of the Court of Appeal. If I

5 Ch. 392.

(1) Law Rep. 5 Ch. 118.

make an order upon Mr. *Fleming's* Petition I shall be deciding that he has established to my satisfaction, and that I am bound by the Court of Appeal to hold, that he is a creditor of this company; but I am certainly not inclined to do so; nor am I inclined finally to conclude a question of so much importance in this stage of the proceedings.

As it is a matter of such vast importance, not only in this particular case, but in hundreds of insurance cases which I am afraid will come before this Court, I will give every facility for taking the opinion of the Court of Appeal upon the question whether Mr. *Fleming* is or is not a creditor of this company. The order to wind up having been made upon the other Petition, he will come in as a creditor of the company, and in that form I think the question ought to be adjudicated upon. That being so, I shall make the order to wind up on Mr. *Kettle's* Petition only; Mr. *Fleming* may then at the proper time bring in his claim as a debt. After what I have said I should refuse it as a debt, and I should not put him to the trouble of coming here again, but I will give him every facility for going at once to the Court of Appeal.

The only remaining question is as to the costs of the Petition. I should certainly desire that Mr. *Fleming* should have the costs, and I should wish that he should have them by consent.

Mr. *Pearson* and Mr. *Cotton* made no objection.

The VICE-CHANCELLOR:—Then, the Respondents not objecting, the costs of the Petition will be costs in the winding-up.

Solicitors for *Fleming:* Messrs. *Mackenzie, Trinder, & Co.*
Solicitors for *Kettle:* Messrs. *Deane & Chubb.*
Solicitors for the Respondents: Messrs. *Lewis, Munns, & Co;* Messrs. *Payne & Layton.*

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In re INTERNATIONAL LIFE ASSURANCE SOCIETY, AND HERCULES INSURANCE COMPANY.

Ex parte BLOOD.

Novation of Contract—Policy of Assurance—Transfer of Business by one Life Assurance Office to another—Indorsement on Policy—Payment of Premium to new Office.

B., the holder of a life policy of assurance in the *I. Assurance Society*, having received from the chairman of the society a letter informing him that the society had been dissolved and had transferred its business and assets to the *H. Insurance Company*, and that he was entitled to have his policy exchanged for a new one, or an indorsement made thereon on the part of the *H. Company* "guaranteeing its due fulfilment," sent his policy to the office of the *H. Company*, who returned it to him with an indorsement charging the funds and property of the *H. Company* with the payment of the sum assured on payment of the future premiums to the *H. Company*. *B.* paid one premium to the *H. Company*, and on the dropping of the life sent in his claim to the *H. Company*:—

Held, that *B.* had not merely accepted the liability of the *H. Company* as a guarantee for the payment of the policy, but that there had been complete novation of the contract, and that the *I. Society* was released from liability on the policy.

THIS was an application, adjourned from Chambers, by *Joseph Blood*, the holder of a policy for £700 on the life of *William Jones*, effected with the *International Life Assurance Society*, for liberty to prove his claim on the policy against the *International Society* and the *Hercules Insurance Company, Limited*, or one of them, both the companies being in course of winding up; the former by, the latter under the supervision of, the Court.

The policy was effected by *Jones* on his own life, on the 14th of September, 1841, under a half-yearly premium of £20 18*s.* 7*d.*, and was assigned by *Jones* to *Blood*, who was a solicitor, on the 12th of October, 1867. At that time bonuses to the amount of £166 19*s.* had been added to the policy.

In July, 1868, the *International* transferred its business and assets to the *Hercules*, and on the 31st of August the chairman of the *International* sent to *Jones*, who immediately forwarded it to *Blood*, the following letter:—

"I beg to announce to you that the above *Society* having been

dissolved, its business and assets have been transferred to the *Hercules Insurance Company, Limited.*

"In so doing, the directors of the *International* have carefully protected the interests of their policy-holders. The *Hercules* was established in 1863, with a capital of half-a-million; its present income, which is fast increasing, is already £10,000 per annum, while its realized assets are proportionately large.

"In compliance with the terms stipulated on behalf of the policy-holders, you are entitled to have your policy exchanged for a new one, or an endorsement made thereon, on the part of the *Hercules*, guaranteeing its due fulfilment. These terms the directors are now prepared to carry into effect on your forwarding your policy to the head office of the *Hercules*, No. 25, *Cornhill, London*, to which company your future premiums will be payable."

In October, 1868, *Blood* paid the premium which became due in September to the *Hercules Company*, and took the following receipt, signed by the manager and secretary:—

"*Hercules Insurance Company, Limited*, to which has been transferred the business of the *International Life Assurance Society.*

"Receipt No. 59,093.

"Policy No. 1330. £20 18*s.* 7*d.*

"Received this 6th of October, 1868, of Mr. *William Jones*, the sum of £20 18*s.* 7*d.*, being the premium for six months, ending the 9th day of March, 1869, for the assurance of the sum of £700 upon the life of himself, agreeably with the terms of a policy of assurance granted the 14th of September, 1841, numbered as above."

At the same time *Blood* sent the policy to the office of the *Hercules Company*, and the following memorandum, dated the 7th of October, 1868, was endorsed upon it, and signed by two directors of the *Hercules*:—

"Memorandum. It is hereby declared that, subject to the proviso hereunder stated, the funds and property of the *Hercules Insurance Company, Limited*, as provided for in the articles of association of the said *Company*, shall be liable for the due payment of the sum of £700, assured by the within policy with the *Inter-*

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national Life Assurance Society, to the person or persons legally entitled to receive the same.

"Provided always, that the future premiums, payable in respect of the said policy, be duly paid to the said *Hercules Insurance Company, Limited*, at the times and in the manner set forth in the said policy."

Jones died on the 12th of November, 1868, and *Blood* thereupon sent in his claim on the policy to the *Hercules*, whose secretary, on the 4th of December, wrote to him acknowledging the receipt of the claim, and stating that it would be submitted in due course to the directors. On the 30th of December, 1868, and the 3rd of February, 1869, he again applied to the *Hercules*, and on the latter day was told by the secretary that his claim was "all right." On the 15th of February he called at the office of the *Hercules* but found the doors closed, the *Company* having, in the meantime, passed resolutions for its voluntary winding up.

In December, 1868, a Petition to wind up the *International Society* was dismissed, but on the 19th of February, 1869, the *Society* was ordered to be wound up by the Court; and on the 23rd of February the voluntary winding up of the *Hercules* was ordered to be continued under the supervision of the Court.

This summons was taken out in April, 1869. The applicant, in his first affidavit in support of the application, did not verify the letter of the 31st of August, 1868; but on the 28th of January, 1870, after the case had been opened, he filed an affidavit (which was admitted by consent,) verifying the letter, and stating that in accepting the endorsement on the policy he intended simply to obtain a guarantee from the *Hercules*, and not to release the *International* from their liability.

Mr. *Osborne*, Q.C., and Mr. *Chitty*, for the applicant:—

The applicant is entitled to prove against both companies. The original liability of the *International* has not been released, and the *Hercules* has guaranteed the payment of the policy money. The acceptance of a new security does not necessarily discharge the original debtor: *Harris* v. *Farwell* (1); and in this case the

(1) 15 Beav. 31.

Court will not, without the strongest evidence, infer an intention to release the assets of a long established insurance office from liability on a policy upon which they had received premiums to an amount far exceeding the sum insured. No such intention can be inferred from the conduct of the applicant. The letter of the chairman of the *International* offered him two alternatives: a new policy of the *Hercules* in exchange for his policy, or an endorsement on the part of the *Hercules*, guaranteeing the due fulfilment of his existing policy. If he had accepted the former, he would no doubt have released the *International;* but he preferred to retain his right against the *International*, and therefore he chose the guarantee; he paid the premium to the *Hercules* as the agents of the *International*, in accordance with the directions contained in the letter, and the form of receipt shews that it was received as a premium on the policy of the *International*. The endorsement on the policy only extends to the £700, and gives him no right against the *Hercules* in respect of the bonuses. He was not bound either to discharge the *International*, or to object to the transfer of business, which for all he knew might be authorised by the deed of settlement; if it was *ultrà vires* he would acquire no right as against the *Hercules*: *In re Era Assurance Society* (1).

[The Vice-Chancellor: I am satisfied that the endorsement on the policy was intended to make the *Hercules* liable for all moneys payable under the policy, including accretions.]

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the official liquidator of the *International*, and Mr. *Phear*, for the creditors' representative, who had liberty to appear in all matters in the winding up of the *International*:—

It is a clear case of novation; the intention to accept the liability of the *Hercules* in substitution for that of the *International* could not have been shewn more clearly than by taking this endorsement on the policy. The Court of Appeal, in *In re Family Endowment Society* (2), considered that if there had been an endorsement on the annuity deed in that case there would have been novation. Here, the transfer was not *ultrà vires*, as in *In re Era Assurance*

(1) 2 J. & H. 400. (2) Law Rep. 5 Ch. 118.

6 Jun 1834

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In re International Life Assurance Society, and Hercules Insurance Co. *Ex parte* Blood.

Society (1). The letter of the 31st of August, 1868, informed *Blood* that the *International* had been dissolved, and that they had transferred their assets, upon which his policy was charged, to the *Hercules;* he must have understood that they intended to substitute the liability of the *Hercules* for their own, and if he had meant to retain their liability he would have said so, and objected to be transferred to the *Hercules.* The word "guaranteeing" in the letter was evidently not used in any technical sense; it only meant that the substitution of one office for the other might be effected either by a new policy or by an endorsement on the old policy. The conduct of the applicant after the dropping of the life clearly shews that he looked to the *Hercules* as the only party liable to him under the policy.

Mr. *Cotton,* Q.C., and Mr. *E. Ford,* for the liquidator of the *Hercules*:—

We admit the liability of the *Hercules,* but we object to the claim of the applicant being admitted against both companies—the *Hercules* being bound to indemnify the *International.*

Mr. *Osborne,* in reply.

Sir R. Malins, V.C., after stating the facts, and observing, that the prudent course for Mr. *Blood* to have adopted on receiving the notice of the transfer of the business and assets of the *International* to the *Hercules,* would have been to refuse to accept a policy in the *Hercules,* which was an office of only five years standing, but to offer to accept a policy in some office of equal standing and credit with the *International,* and that probably he was misled by the statements in the letter of the 31st of August, 1868; and, adverting to the fact that, after the death of *Jones* he sent in his claim to the *Hercules* only, and made no claim against the *International* until after he found the office of the *Hercules* closed on the 15th of February, 1869, and that, in the meantime, it was matter of public notoriety that a Petition had been presented upon which a contest was going on for the winding up of the *International*—continued:—

I do not wonder that Mr. *Blood* makes every attempt to make

(1) 2 J. & H. 400.

all these parties liable to him; I should very much rejoice to see it done; but what I have to consider is, whether upon the whole transaction I must attribute to him the intention—and it is a question of fact in all these cases, what was the intention at the time—to let off one debtor and take another; or an intention merely to acquire a guarantee, and an additional liability of a new party, retaining that of the old one.

Now, I had yesterday, in the case of the *National Provincial Life Assurance Society* (1), to consider the general question, what intention ought to be attributed by the Court to a person, as to accepting a policy in one office in lieu of the policy of another; or in other words, as I then expressed myself, whether, when he has a policy in office *A.*, and has notice from *A.* that *A.* is about to discontinue business and hand that business over to office *B.*, and knowing all these circumstances he continues from year to year (and in the case yesterday it was no less than thirteen years) paying premiums to office *B.*, the Court ought not to consider that there was an intention to release the original office, and accept the liability of the substituted office. Here I have not that length of time. There it was a payment of premiums for thirteen years, here it is payment of one premium only; and if it had rested on the payment of that premium only, I think I should have had very considerable difficulty in arriving at the conclusion that there had been novation which bound Mr. *Blood.* But in order to put himself in a situation of having a legal demand against the *Hercules* he actually sends the policy for endorsement, as he was invited to do. I am of opinion, apart from the circumstance of the contents of the letter of the 31st of August, which I shall advert to, that after the communication made to him that the *International* was about to dissolve or had dissolved, and the tender made to him of the liability of the *Hercules*, his paying the premiums to the *Hercules*, and taking the endorsement from them is conclusive that he acceded to the proposal to accept the *Hercules* and let off the *International* altogether. Then it was very much pressed upon me, that although that might have been the effect of the transaction by itself, if no correspondence had taken place, the terms of this letter, written by the chairman of the *Interna-*

(1) *Ante*, p. 306.

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tional, dated the 31st of August, 1868, being the only communication made to Mr. *Blood* of the intended transfer, are such that he is entitled to treat this, not as a novation, but as a guarantee. Now the letter is in these terms:—[His Honour read the first two paragraphs of the letter, and continued:—] I do not doubt that if he believed these statements, and I suppose he did believe them—that the *Hercules* had a clear income of £10,000, and that it was rapidly increasing, and that they had an abundant capital,—he must have thought that there was something rotten in the state of the *International*, or they would not be giving up their business; and that he should do well to accept the one instead of the other. Now comes the passage in which it is said that not substitution or novation is intended, but guarantee. No doubt the next paragraph is not very accurately expressed: "In compliance with the terms stipulated on behalf of the policy-holders, you are entitled to have your policy exchanged for a new one;" in which case there could have been no question but that that was a novation, "or" (and, no doubt, this is the alternative,) "an endorsement made thereon on the part of the *Hercules* guaranteeing its due fulfilment." No doubt the words there are, "guaranteeing its due fulfilment," but I cannot take a single expression in the letter; I must take the whole letter; and looking at the whole together, what conclusion must I come to? It begins by an announcement that the *International* have dissolved their business and handed over all the assets. The contract of the policy is, not that the individual shareholders should be liable, but that the assets of the company should be liable; therefore he is told that all that they contracted to be liable out of is to be handed over to a new company; and when he is told that he may have a substituted policy or an endorsement on the old one, I am of opinion that it means the same thing,—that whether the liability of the *Hercules* is shewn by a new policy, or whether it is shewn by an endorsement upon the old policy, it means a substitution of one for the other, a complete novation of contract, and it does not, as has been contended, mean merely guarantee. In my opinion he was bound as a reasonable man so to understand it. How, in point of fact, did he understand it? That is best shewn by his conduct. If he thought he had got the guarantee only, is it possible to believe,

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that when the life dropped, if he thought he had two parties liable to him, he would not have given notice to both? His whole conduct from the time the life dropped, on the 12th of November, and from a time much earlier than that, from the time of receiving the letter of the 31st of August to the 15th of February, 1869, when he went to the office of the *Hercules* and was surprised to find a padlock on the door—everything shews that it never entered his mind that he had a guarantee. He had a substitution of the liability of one office for that of the other, and he never thought he had anything more. I am clearly of opinion that it was a mere after-thought on his part to treat it as a guarantee, and that I think is conclusively shewn by the fact, that in his affidavit in support of this claim, filed on the 29th of April last, he attached so little importance to the terms of this letter that he did not verify it; and it is not until the affidavit filed this morning, which I could not have received but by consent, that he ventures to come forward and treat it as a guarantee. I am of opinion that that view of the case entirely fails. I must therefore regard the whole transaction as shewing to my mind most conclusively that Mr. *Blood* intended deliberately, at the time of the option being tendered to him, to accept the liability of the *Hercules*, not as an additional liability, but a substituted liability; and his taking that endorsement on the policy conclusively shews, in my opinion, that he finally and for ever abandoned the liability of the *International*. Therefore, on that ground I must dismiss the summons, so far as he seeks to be admitted as a creditor of the *International*. So far as he seeks to be a creditor of the *Hercules* no opposition has been offered; therefore such a creditor he must be admitted to be. I am clearly of opinion also that the summons is ill founded so far as he seeks to be admitted as a creditor on both; I can only, therefore, at present admit him as a creditor of the *Hercules*. He may possibly, though I do not encourage him in a litigation full of difficulties, have a case upon the misrepresentation contained in that letter, which induced him to enter into the contract, but that I cannot deal with on the present summons; all I can do is to dismiss the summons, so far as he seeks to be admitted as a creditor of the *International*, and accede to it so far as he seeks to be admitted as a creditor of the *Hercules*. As to the costs, I do not think it is a case for

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making the applicant pay the costs, but I cannot give him any costs except by consent. The official liquidators will have their costs out of the respective estates; and as to the creditors' representative, as he had liberty to appear he will have his costs on this occasion; but it must be understood in future that in all cases where the interests of the creditors and of the contributories are identical, the creditors' representative, if he appears, will get no costs.

The order was subsequently varied in Chambers by giving the applicant his costs of the application in moieties out of the estates of the two companies.

Solicitor for the Applicant: Mr. *Hendricks.*

Solicitors for the Respondents: Mr. *J. Tucker;* Messrs. *Barnard & Co.;* Messrs. *Merriman & Co.*

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COX *v.* LAND AND WATER JOURNAL COMPANY.

*Copyright—Newspaper—Registration—*5 & 6 *Vict. c.* 45*—Interlocutory Injunction.*

A newspaper not being within the *Copyright Act* (5 & 6 Vict. c. 45), requires no registration under that Act, but the proprietor of a newspaper has, without registration, such a property in all its contents as will entitle him to sue in respect of a piracy.

Where the proprietor of a newspaper sought to restrain the piracy of "a list of hounds," the Court was of opinion that, although the piracy might be established, the list was liable to such frequent changes, and a correct list was so easily obtained, that it was not a case for an interlocutory injunction.

THIS was a motion on behalf of Mr. *Irwin Cox*, the proprietor of the *Field* newspaper, for an injunction to restrain the Defendants from printing, publishing, selling, or otherwise disposing of, any copies of the *Land and Water Journal* containing the list called "*The Hunting Field of* 1870," or any part of such list, copied or colourably altered from "*The List of Hounds*" contained in the *Field* newspaper. The above list comprised particulars relating to the various packs of hounds in the *United Kingdom*, including the name of each hunt, with the nearest town convenient for

strangers, the number of the hounds in the pack, the hunting days, the names of the masters, huntsmen, and whips, and the address of the kennel.

The Plaintiff proposed by the evidence to shew that the Defendants had copied his list from the fact that various slight errors had also been exactly copied in the Defendants' newspaper.

A preliminary objection was raised on behalf of the Defendants, that the Plaintiff's newspaper, the *Field*, was not registered at *Stationers' Hall*, under the *Copyright Act* (5 & 6 Vict. c. 45), and, consequently, that the Plaintiff had no copyright upon which he could sue so as to restrain a piracy.

Mr. *Glasse*, Q.C., and Mr. *Brooksbank*, for the Plaintiff:—

We admit that the *Field* is not a registered publication, nor is it necessary that a newspaper should be registered at *Stationers' Hall* under the *Copyright Act*. A newspaper does not come within the terms of the Act. A newspaper is not an encyclopædia, review, or magazine, and though it is a periodical work it is not published in a series of books or parts, and could never have been intended to be included in these words. Where the Legislature has been so precise in the terms used, it would have been easy to introduce the word "newspaper," and the omission must be taken to shew that it never was intended that a newspaper should be registered under the Act. It is in evidence that, as a matter of fact, it is not customary to register newspapers for the purpose of the Act. In every section of the Act the principal word used is "book," and by the 2nd section the word "book" is explained to mean "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan." It is impossible to suppose that the Legislature would have intended to include a newspaper under such words as these. The author of every article has a copyright in his composition apart from the *Copyright Act*, and by the 18th section of the Act, a copyright in every article paid for and published in any periodical is vested in the proprietor of the periodical, but under this section no registration is required.

In *Sweet* v. *Benning* (1) it was held that the copyright in reports supplied to the publisher was the property of the pub-

(1) 16 C. B. 459, 480. 1 Jur. N.S. 543.

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lisher, who had a right to sue in respect of a piracy; and the same principle may be drawn from *Brown* v. *Cooke* (1), and *Mayhew* v. *Maxwell* (2), where it was held that it was no objection to a motion by an author for an injunction to restrain a separate publication of his article that it had not been registered at *Stationers' Hall*.

Mr. *Pearson*, Q.C., and Mr. *Loudon*, for the Defendants:—

We raise two points: first, that the Plaintiff has no copyright in the article for which he alleges a piracy; and secondly, that, if he has a copyright, he cannot sue until the paper is registered under the *Copyright Act*.

There can now be no copyright in an article unless the publisher has a copyright in the paper in which it is published, and this cannot be acquired except by registering the paper under the Act. It is true that newspapers are not often registered, simply because the news is of such an ephemeral nature that they are not worth registering; and it is evident by the preamble to the Act, which recites "that it is expedient to amend the law of copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world;" that it was never intended to give copyright to such literary productions as newspapers. In the case of *Sweet* v. *Benning* (3) the question was one of contract, whether there was any agreement under which the authors had parted with their copyright, and it was held that there was an implied contract. But in *Murray* v. *Bogue* (4) it was held that the Plaintiff could not sue in respect of an edition of his work which was not registered. There can be no right now to sue without registration of the article in which copyright is claimed, and this applies as well to publishers as authors. The term "sheet of letterpress" used in the 2nd section of the Act is an exact definition of a newspaper.

Mr. *Glasse*, in reply only upon the question whether a newspaper was within the words of the Act, cited *Kerr* on Injunctions (5).

(1) 11 Jur. 77.
(2) 1 J. & H. 312.
(3) 16 C. B. 459.
(4) 1 Drew. 353.
(5) Page 188.

SIR R. MALINS, V.C.:—

The preliminary objection taken in this case raises a point of vast importance to the proprietors of newspapers and to the public at large. It is so important that it seems almost incredible that the point should never have arisen, namely, whether the proprietor of a newspaper has or has not such a property in articles published in that newspaper, and paid for by the proprietor, as entitles him to prohibit the publication by any other newspaper in any other form whatever. The point arises thus: The bill is filed by Mr. *Irwin Cox*, the proprietor of the *Field* newspaper, against the Defendants, the *Land and Water Journal Company*, charging that they have improperly published in their paper an article which was composed for his. For the purposes of the argument it must be assumed that the article complained of was a copy of the article of the Plaintiff, and upon that ground the Defendant takes the objection that there can be no copyright in any article published in this newspaper, because it is not registered under the Act 5 & 6 Vict. c. 45, commonly called the *Copyright Act*. Now, suppose, for instance, the proprietor of a newspaper employs a correspondent abroad, and that correspondent, being employed and sent abroad at great expense, makes communications to a newspaper which are highly appreciated by the public, can it be said that another newspaper, published, perhaps, in the evening of the same day, may take and publish those communications *in extenso*, with or without acknowledgment? If the contention of the Defendants is right, the paper which copied might say: "But they are common property. True it is, I admit, that you have paid for them. I admit you have given a great deal of money for them, and they are so very valuable that I desire to turn them to account by publishing them in my newspaper; but you have no property in them, although you pay for them; you cannot sue for your newspaper as a book, for then the copyright must be registered, and as you have not registered the book nothing in the newspaper is protected." If that is the law, it is a monstrous state of law, repugnant to common sense and common honesty, because that there is a property in those articles there can be no shadow of doubt. Still, however clear the right of property may be, if the case falls within the Act of Parliament, I must follow the same

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course which I took in the *Brighton Directory* case: *Mathieson* v. *Harrod* (1). That was clearly admitted to be a book within the *Copyright Act*, and it had been registered at *Stationers' Hall*, but instead of entering the day of publication, according to the requisition of the Act, the month only was entered; and I considered, as other Judges had done before, that the object of registration was to ascertain at what time the publication took place, in order that the public might know when the copyright expired, and when they would be at liberty to publish it in a separate form; therefore, though everything else was complied with except the statement of the day of the month, I held that the omission was fatal, and the bill was dismissed with costs. So, in this case, however clearly I am of opinion that this is a property that ought to be protected, if a newspaper is a book within the second section of the *Copyright Act*, and it being admitted that the *Field* was not registered, that would be equally fatal to the Plaintiff's suit. Now I have put the case of letters from correspondents abroad. With foreign papers we all know it is the practice to publish novels, and in some English newspapers it is also done. Supposing a newspaper proprietor were to engage the first novelist of the day to write for him a novel to be published in his newspaper, part every day, and pay him highly, is the proprietor of such a newspaper to lose all property because the paper is not registered? What information would it give if it were registered? Would the registration of a paper called the *Field*, registered twenty years ago, give information as to when the copyright would commence and end? Not the slightest; and therefore it is not within the policy of the Act, and I am of opinion that it is not within the words of the Act. The question depends first upon the 2nd section of the Act. What is a book? because every book must by the 24th section be registered. We find that "book," under the 2nd section, "shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, or dramatic piece," and so forth. Now, certainly, a newspaper does not fall within any of those descriptions, and if it was intended that this Act should be applied to newspapers, it would have been inserted, as the word "newspaper" is well understood; and that

(1) Law Rep. 7 Eq. 270.

word not being inserted, I must take it as advisedly omitted because it was not the intention of the Legislature that newspapers should be included within the Act. Then comes the section which prescribes what is to be done with regard to periodical publications. Sect. 19 provides: "That the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at *Stationers' Hall* under this Act on entering in the said book of registry the title of such encyclopædia, review, periodical work, or other work, published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first number or volume first published after the passing of this Act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof." That, again, does not mention newspapers, and I must come to the same conclusion, that a newspaper was not mentioned because it was not intended to be included. Then, can a person have any copyright or property in that which is not registered under the Act? This depends, I apprehend, upon the construction of the 18th section, which enacts, that when any publisher or other person shall . . . have projected, conducted, and carried on . . . any encyclopædia, review, magazine, periodical, work, or work published in a series of books or parts, or any book whatsoever, and shall have employed any person to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, &c., shall be composed on the terms that the copyright shall belong to such proprietor, and be paid for by him, then the proprietor of such work shall be entitled to copyright (except that after the term of twenty-eight years the copyright shall revert to the author), and shall be entitled to sue upon registering the same at *Stationers' Hall*. Now, must every right included in this section be registered according to the Act? The present Lord Chancellor decided that question in *Mayhew* v. *Maxwell* (1). Mr. *Mayhew* wrote a certain article, or series of articles, in a periodical called the *Welcome Guest*, and the proprietor proceeded to publish them in a separate

(1) 1 J. & H. 312.

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form. The Plaintiff filed his bill to restrain him from publishing them in any other form than in that for which he wrote the work. The same point arose in *Strahan* v. *Graham*, where Mr. *Graham* had sold the right of publishing photographs of the *Holy Land* in a publication called *Good Words*, in which Dr. *M'Leod* was publishing a work with regard to the *Holy Land*, and the proprietors of *Good Words* had given him permission to use the photographs, but Mr. *Graham* contended that Mr. *Strahan* had no right to give it to Dr. *M'Leod*. I decided in that case, and my decision was confirmed by Lord Chancellor *Chelmsford*, that there was no right to publish in a separate form that which he had authority only to use in *Good Words*, and that Mr. *Graham* had a good right of action. (4) But these cases are distinct authorities to shew that there is a property in a publication, although it is not registered. That is the ground upon which Vice-Chancellor *Wood* commented on the 24th section in *Mayhew* v. *Maxwell* (1). He says: "The Plaintiff has not registered under the 24th section." Now I have been referred to the case of *Sweet* v. *Benning* (2), which was a case between Mr. *Sweet*, the proprietor of the *Jurist*, and Mr. *Benning*, a bookseller. *Sweet* brings an action against *Benning* for copying the marginal notes of cases in a separate publication. This was the subject of the action. I suppose the *Jurist* had been published before this Act of 5 & 6 Vict., and therefore it was not registered at all. If so, the question whether these reports, published in the *Jurist*, were subject to the provisions of the Act did not arise. Now, in deciding that case, *Jervis*, C.J., said (3): "I think that under the circumstances stated there is an implied condition, understanding, or arrangement between the proprietors of the *Jurist* and the gentlemen who furnished them with reports, that the former shall acquire a copyright in the articles so written." Now, therefore, it appears to me that a "newspaper," which is the best possible and only definition of such a publication as the *Field*, not being within any of the provisions of this Act, I must infer that it was not the intention of the Legislature to apply the Act to newspapers (for it was absolutely impossible that it should have missed insertion in some of the sections), and that the circumstance of non-registration throws no difficulty in

(1) 1 J. & H. 312, 314. (2) 16 C. B. 459. (3) 16 C. B. 480, 481.

(4) 11 W. R. (1867) 179; 1 Jur. N. S. 543. 1 Jur. N. S. 545. (1868) 91

the way of the Plaintiff maintaining his right in law or equity; and though it is seldom worth the while of proprietors to assert the copyright in articles in a newspaper, I am of opinion that, whether it be the letters of a correspondent abroad, or the publication of a tale, or a treatise, or the review of a book, or whatever else, he acquires—I will not say as copyright, but as property—such a property in every article for which he pays, under the 18th section of the Act, or by the general rules of property, as will entitle him, if he thinks it worth while, to prohibit any other person from publishing the same thing in any other newspaper, or in any other form. Therefore, I am of opinion that the preliminary objection taken by the Defendants must be overruled.

Mr. *Glasse*, Q.C., and Mr. *Brooksbank*, then moved for the injunction:—

It appears from an examination of these two publications that there are numerous instances of copying, and this is more distinctly shewn by the fact that small errors and inaccuracies are copied *verbatim*, which could not otherwise have found their way into the Defendants' publication. It may be true that the appointments of hunts, the names of masters of hunts, as well as huntsmen and whips, may be obtained by anyone, but they are not to be got without great trouble and some expense; and a person to entitle himself to publish such a list as this must work it out for himself, and not copy from another publication. This was decided in *Kelly* v. *Morris* (1); *Morris* v. *Ashbee* (2); *Mawman* v. *Tegg* (3). This is not a small matter, but is one of great importance to the Plaintiff, as the sale of the list is very large.

Sir R. Malins, V.C.:—

With regard to the contents of this list, a piracy of which is alleged by the Plaintiff, I find in the first place "the hunting days" of each pack of hounds, and I believe that a similar list is published in every newspaper, and it is a matter of public notoriety that many persons connected with hunting can draw up such lists from their own information. Then with regard to the masters' names, these are also well known, and the huntsmen's

(1) Law Rep. 1 Eq. 697. (2) Law Rep. 7 Eq. 34. (3) 2 Russ. 385.

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names are nearly as familiar. But the whips being numerous and obscure persons, they would not be so well known. It is admitted on both sides that the mode of obtaining this information is by issuing a circular, as is done by the various Court Guides, and all that is required here is the issue of circulars requesting the masters of the hunt to fill up the required information. The case made by the Plaintiff is, that he has obtained this information accurately, while the Defendants, without putting themselves to any trouble, have made up their list from the Plaintiff's, and they have taken the Plaintiff's list and copied it completely, down to the minutest errors; and, certainly, so far as I can see at present, it seems in the highest degree probable, and I thoroughly believe, that an unfair use has been made of the Plaintiff's list to that extent. There are inaccuracies and omissions in the Plaintiff's list which are followed exactly in that of the Defendants, and various things lead me to the conclusion that the Defendants, having experienced some difficulty in getting the information, have actually copied the Plaintiff's list, and for the purpose of the present decision I assume that to be so. I also assume the law to be perfectly clear and settled as laid down by the present Lord Chancellor in *Kelly* v. *Morris* (1), as also by the case of *Morris* v. *Ashbee* (2). It is clear that in this case the getting the names of masters of hunts, the numbers of hounds, the huntsmen, and whips, and so forth, is information open to all those who seek to obtain it; but it is information they must get at their own expense, as the result of their own labour, and they are not to be entitled to the results of the labours undergone by others. And this is the principle of *Kelly* v. *Morris*. But in this case, as in many others, the question arises, is it a case for the interference of the Court of Chancery at all? and if it is a case for interference, is it a case for interference on an interlocutory application? Now, I do not think it is a case to be decided on an interlocutory application; and my reason is this: this list must be corrected from week to week; it could not be a correct list from the 1st of November until April, or to the end of the hunting season. Changes must take place; the list of masters, huntsmen, and whips can hardly

(1) Law Rep. 1 Eq. 697. (2) Law Rep. 7 Eq. 34.

continue to be correct, even for a week. Now, suppose I were to grant an injunction, how can it be acted upon? The Defendants have only to issue a fresh circular, make an urgent appeal for answers, or send a person by rail and get the information from the masters of the hunts, and next week bring out a very correct list; and how am I to know the way in which they got their information? At present, I do not see that I can interfere. Whether the Plaintiff is entitled to any remedy I do not at present decide, but I do not think it a case for an injunction, though the Defendants are not entitled to avail themselves of the Plaintiff's labours. I should have thought it scarcely worth while for the proprietors of the *Field* to come into Court upon such an insignificant matter. But as they have done so, there is a question which will have to be decided, and that which, after all, is the most material question, namely, the costs of the suit. I would suggest to the parties that the wisest thing would be to let the bill be dismissed without costs. But if they do not agree, then I simply refuse the motion, leaving the case to be decided at the hearing. It may be a question for damages, but I shall certainly not grant an injunction. For the present I refuse the motion, and say nothing about the costs.

Solicitor for the Plaintiff: Mr. *W. Jacquet.*
Solicitors for the Defendant: Messrs. *Bischoff, Bompas, & Bischoff.*

KENRICK *v.* WOOD.

Married Woman—Separate Income—Power of Attorney by Husband and Wife —Next Friend—Costs.

Where a married woman, who was entitled to the income of property held on trust for her separate use, with a restraint on anticipation, joined with her husband in a power of attorney to receive and to sue for any moneys due to them or either of them:—

Held, that the trustee was not justified in paying the attorney the wife's separate income. Neither would the power entitle the attorney to institute an administration suit in the name of the wife by himself as next friend.

Where a next friend of a married woman institutes, without her consent, a useless suit he will be ordered to pay the costs.

THIS was a motion on behalf of the Plaintiff, who was a married woman (by Mr. *Grieve*, her next friend for this purpose), that all

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proceedings in the suit might be stayed on the ground that it had been instituted by *George Kenrick* as next friend of the Plaintiff, without her authority, and that he might be ordered to pay all the costs of the suit, including those of the present motion.

Jane Leigh, who died in 1867, by her will gave the residue of her estate, after payment of her debts, to be divided in two moieties, one of such moieties to be paid to her niece, Miss *Leigh*, absolutely, and the other moiety to be invested, and the interest paid to the Plaintiff Mrs. *Kenrick*, another niece, for life, for her separate use, without power of anticipation, and after her death upon the trusts therein mentioned; and she appointed the Defendant, Mr. *Wood*, her executor.

The executor realized the assets of the testatrix, and after paying all the debts the residue was invested in £1640 Consols. One moiety of this sum was transferred to Miss *Leigh*, who accepted the same in satisfaction of her share, and the remaining moiety, £820, was held by the Defendant for the benefit of the Plaintiff, Mrs. *Kenrick*, for life, according to the trusts of the will.

At this time Mrs. *Kenrick* and her husband were residing in *New Zealand*, and an application was made to the Defendant by Messrs. *Rooks, Kenrick, & Harston*, as the solicitors of the Plaintiff, for an account of the estate of the testatrix. This account was furnished to them by Messrs. *Hooke & Street*, the Defendant's solicitors, and they were at the same time informed that there was a sum of £23 14*s.* due to Mrs. *Kenrick* in respect of dividends. Messrs. *Rooks & Co.* thereupon required that the £23 14*s.* should be handed over to Mr. *George Kenrick*, a member of the firm, and brother-in-law of the Plaintiff, who claimed to be acting under a power of attorney from Mrs. *Kenrick* and her husband.

In answer to this application the Defendant requested that the power of attorney might be produced to him, as he was advised that he should not be justified in paying the money without the separate receipt of Mrs. *Kenrick*. Several letters then passed between the solicitors on both sides, in which Messrs. *Rooks & Co.* insisted upon the £23 14*s.* being paid to Mr. *George Kenrick*, and offered inspection of the power of attorney at their office. Messrs. *Hooke & Street*, on the other hand, repeated their determination not to pay the money until the power was produced to them at

their office—the correspondence terminating with an expression of intention on the part of Messrs. *Hooke & Street* that if the power were not produced the dividends, which, by another half-year's payment, amounted to £57 11*s.* 4*d.*, would be immediately remitted to a banker in *New Zealand*, who would pay it over to Mrs. *Kenrick* upon receiving her receipt for the same.

This suit was then instituted by an administration summons taken out by Mr. *George Kenrick* as next friend of the Plaintiff; and after advertisements had been issued for creditors in the *Gazette* and other papers, and after nine attendances in Chambers, the result was, that the Defendant's accounts of the estate were found to be perfectly correct.

In the meantime communications took place between Mrs. *Kenrick* and the Defendant, in which Mrs. *Kenrick* stated that the suit had been instituted without her knowledge or consent, and she desired that the money should be remitted to her, and not paid to Mr. *George Kenrick*. The Defendant had not complied with Mrs. *Kenrick's* desire of sending the money to *New Zealand*, having been advised that he could not safely do so pending these proceedings.

It appeared that there had been a power of attorney executed in *New Zealand* by *Richard Kenrick* and the Plaintiff his wife in 1862, constituting *George Kenrick* their attorney for the purpose of getting in any money which might become due to the Plaintiff or to her husband from the estate of the testatrix on her decease, with power in the name of the Plaintiff and her husband to sue for and recover any sums belonging to them or either of them; and it was stated in evidence that there was a debt due from *Richard Kenrick* to his brother *George Kenrick*.

Mr. *Glasse*, Q.C., and Mr. *Dauney*, in support of the motion:—

There was no pretence for instituting this suit. The estate of the testatrix had been properly administered, and the few debts having been paid, there remained a sum which could be dealt with in one way only, namely, by paying one moiety to one legatee, and reserving the other moiety for Mrs. *Kenrick* for life. Throughout the correspondence between the solicitors there was no suggestion that the accounts were incorrect; but when Mr. *Kenrick*

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found that he could not get the money paid to himself, this suit was instituted, the only effect of which has been to create costs and do no good whatever. The power of attorney executed by Mr. and Mrs. *Kenrick*, even if it had been produced to Mr. *Wood*, was not an authority which would legally entitle him to pay over the money which was left to Mrs. *Kenrick* for her separate use without power to anticipate, unless he received her separate receipt, and the only way of obtaining such receipt was that which Mr. *Wood* proposed to take, namely, to send the money to a banker in *New Zealand*. Under any circumstances there was no authority given by Mrs. *Kenrick* which could entitle Messrs. *Rooks & Co.* to institute these proceedings on her behalf. Their conduct is altogether unjustifiable; and both on the ground of conduct, and on the technical ground of want of authority, we ask that all further proceedings in the suit may be stayed, and that Mr. *George Kenrick*, as the next friend who instituted the suit without authority, may be ordered to pay all the costs occasioned thereby.

Mr. *Cotton*, Q.C., and Mr. *Bradford*, for *George Kenrick*:—

The power of attorney executed by Mrs. *Kenrick*, constituting Mr. *George Kenrick* her attorney for getting in the moneys coming to her under the will of the testatrix, with power to sue for and recover any money belonging to her, was sufficient authority to the next friend to institute these proceedings. Mr. *George Kenrick* was perfectly justified in taking steps for ascertaining the correctness of the accounts, and an administration summons was the proper course for that purpose.

SIR R. MALINS, V.C.:—

This is a motion that all proceedings in this suit may be stayed, and that the next friend, who is a solicitor, may be ordered to pay the costs of the suit. The motion is directed against a gentleman with whose conduct in conducting his business I have never before had reason to be dissatisfied, but in the present instance the institution of this suit has been a lamentable mistake. The testatrix died in January, 1867, and the residue, which was ascertained shortly after her death to be £1640, was to be divided between Miss *Leigh* and Mrs. *Kenrick*. The executor paid half

the amount to Miss *Leigh*, who was satisfied with the correctness of the accounts, and the rest he kept for Mrs. *Kenrick* and her children; Mrs. *Kenrick's* moiety being given for her separate use for life, without power of anticipation. The income, therefore, would be between £24 and £25 a year. That residue being clearly ascertained, and no person raising the slightest doubt as to Mr. *Wood's* account, a correspondence of a most unsatisfactory character ensues, I must say little creditable to the discretion of either of the parties; it was carried on during the whole of the year 1868, upon the question as to how £57, representing the income of this married lady, should be sent to *New Zealand*. It seems that Mr. *Kenrick*, the brother of the lady's husband, had a power of attorney from Mr. *Kenrick*, the husband, and it is stated also that he had one from the husband and wife; but I can only regard it as the power of attorney of the husband, a married woman being incapable of executing a power of attorney, and Mr. *Kenrick* was bound to know that. I come to the conclusion that Mr. *Kenrick's* object in desiring to possess the £57, was to apply part of it in payment of a debt owing from his own brother to himself. He was, therefore, quite overlooking the position of the parties in endeavouring to apply this married woman's property, given to her for her separate use without power of anticipation, in payment of his brother's debt. It was quite right that the brother should pay his debt, but it was quite wrong that the wife should be forced to pay it out of property so given. As to that correspondence, it is most important to consider this, that there never was a shadow of doubt raised as to what the residue consisted of.

These two firms, *Rooks, Kenrick, & Harston* on the one side, and *Hooke & Street* on the other, not being able to agree as to the mode of sending £57 to *New Zealand*, *Hooke & Street* stating generally that they would send it through a banker, and Mr. *Kenrick* insisting upon having the money, *Hooke & Street* wrote, "shew us the power of attorney, call at our office in *Lincoln's Inn Fields*, and if it authorizes you to receive the money, we will pay it, but if not, we will send it through a banker." These two solicitors cannot settle whether one shall call and shew the power of attorney, or whether the other shall call and look at it. Mr.

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Kenrick, conducting his business on behalf of his sister-in-law, does not think fit to go to *Hooke & Street* in *Lincoln's Inn Fields*, and shew the power of attorney that he has, and the victim of all this was this unfortunate lady in *New Zealand*. There having been no question raised during the whole period, extending over a year, as to the amount of the trust fund, this suit was instituted on the 7th of December, 1868.

It was impossible to expect that any benefit could be derived from this suit. It is an administration summons, and the regular proceedings have been gone through. My Chief Clerk, who has been here, tells me that the attendances were nine. Advertisements have been issued to ascertain who were the creditors, twice in the *London Gazette*, twice in the *Times*, and also in other papers; and after all this expense has been incurred, it turns out that even down to the very penny the account which the executor rendered is perfectly right, and the residue did consist of £1639 6*s*. Now, can any thing be more unfortunate than the result of such a litigation as this? But is it more unfortunate than any reasonable man might have seen it would be when it was instituted? No one could anticipate any benefit from it for this lady whose interests were thus sacrificed. Was it with a desire to make costs, which I should be sorry to suppose, or was it because there was a quarrel with another firm of solicitors? In any view of the case, the costs would have to be paid by somebody; I do not know what they would amount to if taxed, but probably £100. Advertisements were issued to ascertain whether there were creditors, when it was perfectly well known there were none. The accounts were taken, which were open for inspection, and the correctness of which Mr. *Kenrick* might have satisfied himself of in ten minutes at any time. Upon the whole, this is a suit so lamentable in its objects, and so lamentable in its results, that upon every principle it will be a wholesome lesson to solicitors who will take upon themselves to institute such suits, to let them know that they will have to pay the costs. The motion is before me upon the ground that this suit was instituted without the authority of the married woman, and if so, it is perfectly clear that she cannot, either directly or indirectly, be made to pay the costs of it. Here she would be made directly to

pay them, because if they are paid out of the fund, it would be a diminution of the fund of which she is tenant for life, and which goes over to her children after her death.

Then was it instituted by her authority? The rules of the Court upon this subject, I apprehend, are free from doubt. It is very beneficial that anyone may institute a suit on behalf of an infant who cannot exercise any discretion; but in the case of a married woman, no person has a right to institute a suit on her behalf without her express authority, and it ought even to be in writing, and all prudent solicitors will take care they have authority in writing. It was said that Mr. *Kenrick* had authority to institute this suit under a power from her. I have already pointed out that the power of attorney was a nullity, because she was incapable of executing it. Before a suit of this kind was commenced, there ought to have been direct authority to institute it. Suppose Mr. *George Kenrick* had written to her, and told her the truth of the case as to Mr. *Wood*, the friend of the family, in whom everybody had confidence: "He has in his hands £820, which he holds for you as tenant for life; one-half of the fund he has paid over to Miss *Leigh*, to which she is absolutely entitled, and the other half is given to you, and he is ready to pay the income to you. There is no question whatever about it, his accounts are perfectly accurate, he has paid all the debts, and there is no doubt whatever that £1639 is the residue; if you institute a suit there will certainly be a considerable amount of expense, probably from £100 to £200, which will be a diminution of your share; will you authorize me under those circumstances to institute a suit which will be perfectly useless, worse than useless, because it will delay you in the receipt of your income, and cost you at least £100?" The answer that would have been received is perfectly obvious: she would have refused to give such authority. Before he instituted such a suit he was bound to know, and I think he must have known, it could only result in expense, and not in any benefit, and I must order Mr. *Kenrick* in this case to pay the costs which have been occasioned by this suit.

With regard to the Defendant *Frances Leigh*, who received her share, is it not a grievous hardship that this lady, who was perfectly satisfied with the conduct of the executor, should be dragged

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before the Court and put to expense? ought she to lose anything? Clearly not. The expense was caused by the gentleman who has instituted this suit, and he must pay her costs. In fact, upon all these grounds, and the technical ground that the suit was instituted without authority, Mr. *Kenrick* must pay the costs of all parties brought before the Court, and he must also pay the costs of this motion.

Solicitor for the Plaintiff: Mr. *S. P. Smith.*

Solicitors for Mr. *George Kenrick:* Messrs. *Rooks, Kenrick, & Harston.*

Solicitors for Mr. *Wood:* Messrs. *Hooke & Street.*

V.-C. M. 1869 *Dec.* 20.

BOWYER v. GRIFFIN.

Practice—Costs—Bankrupt—Trustee.

A defaulting trustee is entitled to his costs of a suit for the execution of the trusts incurred after his bankruptcy, or after the registration of a creditors' deed executed by him under the *Bankruptcy Act*, 1861.

THIS was a suit by *John Bowyer*, one of the trustees of the will of *Robert Gallimore*, against his co-trustee, *Thomas Griffin*, and the *cestuis qui trust*, for the execution of the trusts of the will, and for the discharge of the Plaintiff from the trust and the appointment of a new trustee in his place.

The bill was filed on the 3rd of January, 1868. On the 27th of December, 1867, the Defendant *Griffin* executed a deed conveying all his property in trust for his creditors, which was registered under the *Bankruptcy Act*, 1861, on the 2nd of January, 1868. *Griffin*, by his answer, admitted that he had received £300 belonging to the trust estate.

A petition was now presented by the *cestuis que trust* to carry into effect an agreement between the Petitioners and the Plaintiff for the compromise of the suit upon the terms of the Plaintiff, making good the trust funds which had been lost by the default of *Griffin*, and paying the Petitioners' and his own costs of suit, and new trustees being appointed in the place of the Plaintiff and *Griffin*. The Defendant *Griffin* made no objection to the proposed

order, but claimed to be paid, not only his costs of the Petition, but also his costs of the suit.

Mr. *Batten*, for the Defendant *Griffin*:—

A trustee who has become bankrupt, or has executed a creditors' deed registered under the Act, which is equivalent to bankruptcy, is entitled to his costs, incurred after the bankruptcy or the registration of the deed, of a suit for the execution of the trust, although he was at the date of his bankruptcy indebted to the trust estate: *Turner* v. *Mullineux* (1), *Samuel* v. *Jones* (2), *Morgan* and *Davey* on Costs (3).

Mr. *Archibald Smith*, for the Petitioners, and Mr. *Glasse*, Q.C., and Mr. *Cracknall*, for the Plaintiff:—

There is no authority for the proposition that a defaulting trustee, who is not also an executor, is entitled to his costs of suit incurred after his bankruptcy; and in *Bensusan* v. *Nehemias* (4), Vice-Chancellor *Knight Bruce*, refused costs to a trustee who had been bankrupt, unless he would replace the fund. *Samuel* v. *Jones* was the case of an executor, and in that case Vice-Chancellor *Wigram* was disposed to refuse the costs in the first instance, and only allowed them on the authority of *Gibbons* v. *Hawley* (5), in which case it appears that the administratrix had rendered great assistance in getting in the estate. In *Turner* v. *Mullineux* the bankrupt was executor as well as trustee, and *Bensusan* v. *Nehemias* was not cited in that case. Even in the case of executors the practice has varied: *Carr* v. *Henderson* (6), *Cotton* v. *Clark* (7). The Defendant might have defended in *formâ pauperis*, and it is a great hardship upon the Plaintiff, that besides making good the loss caused by the default of his co-trustee, he should be required to pay his costs.

SIR R. MALINS, V.C.:—

Nothwithstanding the earlier cases, I think the decision of the present Lord Chancellor in *Turner* v. *Mullineux* was founded

(1) 9 W. R. 252.
(2) 2 Hare, 246; 7 Jur. 845.
(3) Page 240.
(4) 4 De G. & Sm. 381.
(5) 2 Hare, 246, n.
(6) 11 Beav. 415.
(7) 16 Beav. 134.

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on principles of justice and common sense. The Defendant *Griffin* was a defaulting trustee; that created a mere money demand against him; he became bankrupt, or what is the same thing, he executed a composition deed, and thereupon all his property vested in the trustees of the deed; then the day after the registration of the deed the bill is filed. So far as the bill seeks to make him account for the trust fund, which he has misapplied, that being a mere money demand, which ought to have been made, not against him personally, but against the trustees of the composition deed, he is improperly made a party; so far as it seeks to execute the trusts and to change the trustees, he is a necessary party; but he is entitled to have his costs paid by those who have brought him and kept him before the Court. If the suit had been instituted before the bankruptcy his costs incurred before the bankruptcy would have been set off against his debt to the estate; but his costs incurred after his bankruptcy, by which he has divested himself of his estate, must be paid. If the question had been *res integra*, I should probably have decided it in the same way, notwithstanding the earlier cases; but I am of opinion that the decision in *Turner* v. *Mullineux* (1), is conclusive upon the matter. I cannot admit that there is any distinction in principle between the case of an executor and that of a trustee. An executor is only one kind of trustee. In *Turner* v. *Mullineux* (1), the decision did not turn upon the trustee being also executor, nor upon his having rendered assistance in getting in the estate. Therefore, both upon principle and authority, I must hold that this Defendant is entitled to have his costs incurred since the registration of the deed, that is, all his costs of the suit, as between solicitor and client, paid by the Plaintiff, who, under the terms of the compromise, is liable to the costs of this suit.

Solicitor for the Plaintiff: Mr. *F. C. Greenfield.*
Solicitors for the Petitioners: Messrs. *Rickards & Walker.*
Solicitors for the Defendant *Griffin:* Messrs. *Wedlake & Letts.*

(1) 9 W. R. 252.

In re WILKINSON'S ESTATE.

V.-C. M.
1870
Feb. 18.

Investment—Cash under the Control of the Court—Direction in special Act to invest in Consols or £3 per Cent. Reduced Annuities—23 & 24 Vict. c. 38, s. 10—Gen. Ord. 1st Feb. 1861, r. 1.

The Court may, under 23 & 24 Vict. c. 38, s. 10, and the General Order of the 1st of February, 1861, rule 1, order the investment in *East India* Stock of a fund paid into Court under the provisions of a special Act anterior to 23 & 24 Vict. c. 38, although such special Act directs the investment to be in Consols or £3 per Cent. Reduced Bank Annuities.

12 Sim. 12
14 Sim. 31.

THOMAS WILKINSON, by his will, devised a rent-charge of £200, issuing out of land in the City of *London*, to trustees, upon trust for the separate use of *Frances Wilkinson*, for her life, and after her death upon other trusts.

The Commissioners of Sewers of the City of *London*, having taken, under the compulsory powers of an Act of Parliament (57 Geo. 3, c. xxix), the land out of which the rent-charge issued, paid into Court, under the provisions of the Act, £5880 for the purchase of the rent-charge.

This was a Petition by *Frances Wilkinson* and the trustees of the will for the temporary investment of the fund in Court in *East India* £4 per Cent. Stock.

The Act provided that the interim investment of money paid into Court for the purchase of land taken from persons incapacitated from selling should be made in £3 per Cent. Consols, or £3 per Cent. Reduced Bank Annuities.

Mr. *Pearson*, Q.C., and Mr. *Haynes*, for the Petitioners, submitted that the fund was "cash under the control of the Court" within the meaning of 23 & 24 Vict. c. 38, s. 10, and the General Order of the 1st of February, 1861, rule 1, and that, consequently, it might be invested in *East India* Stock, notwithstanding the provision of the special Act; and they referred to *In re Birmingham Blue Coat School* (1), in which an investment in Consols was ordered, notwithstanding a provision in a private Act that the fund should be invested in Navy Victualling or Exchequer Bills.

(1) Law Rep. 1 Eq. 632.

V.-C. M. 1870 *In re* WILKINSON'S ESTATE.

[The VICE-CHANCELLOR referred to *Ex parte Great Northern Railway Company* (1).]

Mr. *Pearson*:—That was the case of a Parliamentary deposit, which may probably be considered not to be absolutely under the control of the Court.

SIR R. MALINS, V.C.:—

I think that the special Act is controlled by the subsequent general Act, which enlarged the power of the Court as to the investment of cash under its control.

That is the view which I should have been disposed to take in the absence of authority, and it is supported by the case of *In re Birmingham Blue Coat School* (2).

I will follow that decision and make the order for investment in *East India* Stock.

Solicitors for the Petitioners: Messrs. *Stevens, Wilkinson, & Harries.*

(1) *Ante*, p. 274. (2) Law Rep. 1 Eq. 632.

LEATHER CLOTH COMPANY *v.* LORSONT.

V.-C. J
1869
Nov. 10, 12.

Restraint of Trade—Sale of Secret—Covenant not to manufacture—Public Policy.

Although public policy requires that every man shall be at liberty to work for himself, and shall not deprive himself or the state of his labour, skill, or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labour, skill, or talent, and when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive upon himself, are not unreasonable, having regard to the subject matter of the contract.

Upon the formation of a company for the purchase and working of a certain process of manufacture introduced into this country from *America*, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of *Europe*, any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory" (of the vendors) "and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased":—

Held, that the restriction contained in this clause was not greater, having regard to the subject matter of the contract, than was necessary for the protection of the purchasers, and was capable of being enforced against the vendors.

THIS was a suit to restrain the Defendant *Lorsont* from carrying on the manufacture and sale of leather cloth, and from doing any act in contravention of the engagement on his part, contained in an agreement of May, 1857, not to interfere with the exclusive enjoyment by the Plaintiff company of the benefits thereby agreed to be purchased; from using certain trade marks and price-lists in alleged imitation of those used by the Plaintiff company; and from doing any act likely to mislead the public into the belief that the Defendant was carrying on the business purchased by the Plaintiff company, or otherwise to obtain for the Defendant custom intended for the Plaintiffs.

In 1857 the Plaintiff company was projected for the purpose of purchasing and working certain patents for leather cloth, which had been obtained in *England* in October, 1855, and in January,

V.-C. J. 1869 LEATHER CLOTH CO. v. LORSONT.

1856, by one *Dodge*, a member of the firm of *Dodge, Bacon, & Co.*, on behalf of a joint stock company established in *America* in 1855, under the title of "*Crockett's International Leather Cloth Company.*" These patents were being worked by *Dodge, Bacon, & Co.* at a manufactory at *West Ham*. The Plaintiff company was registered on the 22nd of May, 1857, and on the preceding day an agreement (dated the 21st of May, 1857), was entered into between *Bacon, Dodge, Giandonati*, the Defendant (who had been if not a partner in, actively engaged in assisting, the firm of *Dodge, Bacon, & Co.* in their business), and *C. P. Crockett*, as attorney for the *Crockett International Leather Cloth Company*, of the one part, and *John Murray*, as agent for the intended *Leather Cloth Company* of the other part.

By this agreement it was agreed that the parties of the first part should sell to the intended company when incorporated, and the company should purchase at the price of £20,000, and other the considerations thereinafter mentioned, the letters patent obtained in *France* and in *England* for the manufacture of American leather cloth, and then belonging to the parties of the first part, and the full benefit and advantage thereof, and also the exclusive right of soliciting similar patents in *Belgium* and in all other countries of *Europe*, together with all the processes of manufacture used by them, or their agents or workmen, up to that day, and also the business premises at *West Ham*, whereon the manufacture of the American leather cloth was then carried on, together with the leases thereof, and fixtures constituting the plant of the business or manufactory. The agreement, after containing provisions as to payment of the purchase-money partly in shares and partly in cash, and as a further consideration, that 1200 benefit shares to be created by the intended company should be delivered to the parties of the first part, and that the parties of the first part should sell, and the intended company should buy, at a valuation all the goods on hand, manufactured and not manufactured, raw materials and produce, and furniture, moveables, and effects on the premises at *West Ham*, contained the following clause:—

"The parties of the first part, or any of them, will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others in any part of *Europe* any com-

pany or manufactory having for its object the manufacture or sale of productions which are the subject of the said letters patent, and now manufactured in the business or manufactory so carried on at *West Ham* as aforesaid, and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the said intended company of the benefits hereby agreed to be purchased."

The memorandum of association was subscribed by the Defendant *Lorsont* for 100 shares, and, pursuant to the articles of association, he was appointed, and acted until 1863 as, general manager and superintendent of the factories of the company. He was also appointed a director, and was styled and known and in the circulars described as the managing director of the Plaintiff company, in which capacity he took an active part in the litigation carried on by the Plaintiff company with the *American Leather Cloth Company* (a company constituted in this country in 1861, and carrying on business at premises formerly belonging to the private partnership of *Dodge & Giandonati*), for an illegal use of their trade mark (1), and gave evidence in that suit on behalf of the Plaintiff company.

The sale and purchase under the agreement were completed by an indenture of the 8th of July, 1857, made between *Dodge* of the first part, the *Crockett International Leather Cloth Company*, by *C. P. Crockett*, as attorney of the company, of the second part, and the Plaintiff company of the third part. As the bill alleged, the £20,000 consideration money was paid by the Plaintiff company to the parties to the agreement of the first part, including (as the bill alleged) the Defendant *Lorsont*, and the 1200 benefit shares were duly delivered by the Plaintiff company to such parties of the first part.

In August, 1863, *Lorsont*, who was at the time abroad, in consequence of a judgment obtained against him in an action, was dismissed from his position of manager of the Plaintiff company, and at the expiration of his term of office, in September, 1863, he was not re-elected a director.

In March, 1868, the Defendant commenced to carry on the business of the sale and manufacture of leather cloth at *North*

(1) See 1 H. & M. 271; 33 L. J. (Ch.) 199; 11 H. L. C. 523.

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Woolwich, and in *Cannon Street, City* (in which street are the offices of the Plaintiff company), in breach, as the bill alleged, of the engagement entered into by him by the agreement of May, 1857.

The bill also alleged that the Defendant, in his business, was using trade marks in imitation of those of the Plaintiff company, and also price lists similar in form to those issued by the Plaintiff company, and identical in many particulars, and containing in the margin the imitative trade marks in *fac simile*.

In the circular issued by him on the 10th of March, 1868, the Defendant described himself as "Manufacturer of *Crockett's* Leather Cloth," and stated: "The goods supplied by me are in every respect similar to those made by the *Crockett International Leather Cloth Company* (since known as the *Leather Cloth Company*) whilst their works were under my management, and I may state with confidence that with sixteen years' experience acquired in that business from its origin I am enabled to adopt and bring to bear upon my works every mechanical, commercial, and other improvement of the present day."

The bill alleged that the conduct of the Defendant in his business was calculated and likely to deceive the public into the belief that the Defendant was carrying on the business the goodwill of which was purchased by the Plaintiff company, and which was carried on by the Plaintiff company, and to obtain for the Defendant custom intended for the Plaintiffs.

The Defendant, by his answer, denied that he had been acting in breach of the engagement alleged by the bill to have been entered into by him in the agreement of the 21st of May, 1857. He also submitted that the agreement was not binding in any way upon him, inasmuch as the same was not founded upon any consideration as regarded himself, and that in any case the clause of the agreement by which the parties thereto of the first part agreed that they would not carry on any manufactory was void, as being in general restraint of trade, and therefore not binding upon the Defendant. It was further submitted that the restraints attempted to be imposed by the clause in question did not extend to the prohibition of carrying on the business, manufacture, and sale as now carried on by him, as he had effected considerable improvements

in the manufacture of leather cloth, and the process now carried on by him was different from that in use at the time of the purchase by the Plaintiff company.

The argument was twofold:—

1. As to the validity of the Plaintiff company's trade marks and their right to protection, having regard to the representations therein contained, and the decision of the House of Lords on one of the three trade marks of the Plaintiff company sought to be protected by this suit.

2. As to the validity of the restrictive clause contained in the agreement of May, 1857, sought to be enforced against the Defendant.

The argument upon the first point involved almost identically the same question as that decided by the House of Lords (1), and has therefore been omitted.

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Marten*, for the Plaintiffs:—

There has been a clear breach by the Defendant of his covenant not to carry on the particular process of manufacture which was sold to the Plaintiff company for valuable consideration. It will be contended that a contract imposing a general restraint of trade is void on the ground of public policy; but, on the other hand, public policy will not allow a man who has received valuable consideration to break his agreement unless it plainly and clearly appears that the restriction goes far beyond everything that is required for the protection of the person in whose favour it is to be enforced. Although by the general rule, as laid down in *Mitchel* v. *Reynolds* (2), "all restraints of trade, if nothing more appear, are bad," it is now settled that an agreement in restraint of trade may be valid, provided the restraint be, 1, partial, 2, founded upon not a mere colourable consideration, and, 3, reasonable—the test of whether such a restriction is reasonable being whether it is such only as to afford a fair protection to the interests of the party in whose favour it is given, and not so large as to interfere with the interests of the public: *Archer* v. *Marsh* (3);

(1) 11 H. L. C. 523. (2) 1 P. Wms. 181; 1 Sm. L. C. 6th Ed. 356
(3) 6 A. & E. 959.

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Horner v. *Graves* (1); *Hitchcock* v. *Coker* (2). With respect to the limits of restriction, regard must be had to the nature of the business. If the limit stipulated does not exceed what is, under any circumstances, a sufficient protection to the interest of the contracting party, the contract will be held valid: *Mallan* v. *May* (3). The interest of the Plaintiff has been considered to extend very widely, and "contracts of this nature have been supported where the area of exclusion was apparently greater than the area of the Plaintiff's practice:" *Per Campbell*, C.J., in *Tallis* v. *Tallis* (4); *Whittaker* v. *Howe* (5); *Gale* v. *Reed* (6); *Harms* v. *Parsons* (7).

In this case the agreement, although it extends beyond the *United Kingdom*, is not unreasonable, for the sale by the Plaintiff company of *Crockett's* leather cloth is not confined to this country. The Defendant has sold to the Plaintiff company for valuable consideration the secret of manufacturing this article, and it is well settled that a trader may sell a secret of business in his trade, and restrain himself generally from using it for his own profit: *Bryson* v. *Whitehead* (8); and to prevent him from so restraining himself would operate as a restraint of a very injurious kind: *Rannie* v. *Irvine* (9); *Homer* v. *Ashford* (10).

Mr. *Eddis*, Q.C., Mr. *Fischer*, and Mr. *Cohen*, for the Defendant:—

It is against public policy that, even for valuable consideration, a man should be allowed to contract himself into idleness for the rest of his life, and deprive himself of the means of earning a livelihood; and although a man may for good and adequate consideration restrain himself from trading in a particular place, any general restraint without limit in point of space, though with consideration, is void: *Mitchel* v. *Reynolds* (11). Although the current of modern decisions has been to relax the strictness of the rule against contracts in restraint of trade, yet any restriction which is larger and wider than the protection of the party with whom the contract is made can possibly require is unreasonable in

(1) 7 Bing. 735.
(2) 6 A. & E. 438.
(3) 11 M. & W. 653, 667.
(4) 1 E. & B. 391, 411.
(5) 3 Beav. 383.
(6) 8 East, 80.
(7) 32 Beav. 328.
(8) 1 S. & S. 74.
(9) 7 Man. & G. 969.
(10) 3 Bing. 322.
(11) 1 P. Wms. 181; 1 Sm. L. C. 6th Ed. 356.

the eye of the law, and the contract which would enforce it must therefore be void: *Hitchcock* v. *Coker* (1); *Horner* v. *Graves* (2); *Ward* v. *Byrne* (3).

In this case the restriction, which extends not only to the *United Kingdom*, but all over *Europe*, is practically unlimited both in time and place, and is unreasonable in its nature, being far beyond anything that is required for protection of the interests of the Plaintiff company, and therefore it is void. Nor is it a case in which the Court can hold the covenant divisible, and give effect to part of it, as was done in *Mallan* v. *May* (4), and *Green* v. *Price* (5), where the restriction was held good as to *London* and *Westminster*, but void beyond that limit, as being unreasonable, and beyond what the protection of Plaintiff's interest would require.

[The VICE-CHANCELLOR:—If the covenant is good as to *Great Britain*, we need not concern ourselves with its extension to *France* and *Germany*.]

All the cases shew that there must be some limit in point of space, more especially where the contract is unlimited in point of time: *umford* v. *Gething* (6); *Ward* v. *Byrne;* and it has been already intimated by the present Lord Chancellor, when Vice-Chancellor, that this covenant could not have been enforced: "The covenant and agreement was probably much too large to be enforced in a Court of Law, and very probably the Plaintiffs would not have succeeded in an attempt to enforce a covenant of this description not to manufacture in *Europe*": *Leather Cloth Company, Limited*, v. *American Leather Cloth Company, Limited* (7).

[Mr. *Kay*, Q.C., pointed out that these words were not to be found in the authorized report of the judgment in 1 H. & M. 271.

The VICE-CHANCELLOR:—I must take the authorized report. Expressions very often drop from a Judge, and appear in the short-hand notes, but he may not wish to have them recorded in the reports.]

(1) 6 A. & E. 438, 456.
(2) 7 Bing. 735.
(3) 5 M. & W. 548.
(4) 11 M. & W. 653.
(5) 13 M. & W. 695; 16 M. & W. 346.
(6) 7 C. B. (N. S.) 305.
(7) 32 L. J. (Ch.) 727.

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But in any case the relief sought by the bill is too wide, as it is sought to restrain the Defendant not merely from manufacturing leather cloth according to the processes sold to the Plaintiff company, but from manufacturing any leather cloth by any process whatever. The covenant must be construed strictly, and can only extend to the business and process carried on at the time of the agreement; and the Defendant, by his answer, states that he is not using the process of the *Crockett Company*, but that he has made great improvements, and, in fact, is using a different process from that which was sold to the Plaintiff company.

[Upon the impossibility of interfering by injunction in such a case they cited *Collins* v. *Plumb* (1).]

Mr. *Kay* replied upon the question as to the trade marks.

SIR W. M. JAMES, V.C.:—

I should have reserved my judgment in this case with respect to the more important question that has been argued before me, as to the legal effect and validity of the covenant, had I thought I should derive much assistance by so doing.

With respect to the trade marks, I am of opinion that the Plaintiffs' case fails. The first trade mark (*A.*) is in the same position now that it was when the matter was before the House of Lords, and I am bound by that decision, even if I were disposed to question the propriety of that decision or the reasonings upon which it proceeded. It was there decided that there was a representation of a matter of fact in the trade mark which was calculated to deceive; that there was evidence that it did deceive certain persons; that such a trade mark could not be the subject of any right whatever that this Court would recognise, and, to use the expression of Sir *Roundell Palmer*, that it was "outlawed." That decision concludes and disposes of trade mark *A.* With respect to trade mark *B.*, I am of opinion that it comes within exactly the same principle. It is clear to my mind that it was intended to represent, and did represent, that this was leather cloth which was in some sense or other the subject of a patent. Such a leather cloth never was the subject of a patent. It appears to me, there-

(1) 16 Ves. 454.

fore, that there is upon the face of it that falsehood which has been held in this Court to disentitle the Plaintiff to relief. In a recent case (1) I did grant relief, notwithstanding the word "patent" was inserted in the trade mark, because evidence was given that before the trade mark was used the word "patent" had come to be used and was known as a particular description of thread which all manufacturers of that article knew perfectly well by that name, it possibly having had its origin at some former time when it was the subject of a patent. There is no such evidence in this case, and the whole thing is too recent to admit the possibility of such an explanation as that this particular article had become known to all the trade as "patent leather cloth," so that it was intended to be connected with the American manufacture or the American patents. With regard to *C.*, that must also fail, as it really is a plain and palpable theft of a mark not belonging to the company which sold to the Plaintiffs, but to the company which, after the formation of the Plaintiff company, was established in *America* by the new incorporation of the *Crockett Leather Cloth Company*. With regard, however, to the costs of that part of the suit, the Defendant, who is availing himself of this objection to the Plaintiffs' title, is the man who as manager used the second mark, and has by his own conduct brought the Plaintiffs into this difficulty with respect to it.

I now come to the question with respect to the covenant, which is a very important one as it seems to me. No doubt the covenant is expressed in very large and full terms, and it is insisted that the mere fact that the covenant is "not to carry on nor allow to be carried on in any part of *Europe*," is in itself what is called a general restraint of trade, and that what is called a general restraint of trade is a restraint of trade throughout the *United Kingdom*, and that in that form a restraint of trade extending throughout the *United Kingdom* is upon the face of it bad, though something short of it may be allowable, provided the circumstances justify it. I do not read the cases as having laid down that unrebuttable presumption which was insisted upon with so much power by Mr. *Cohen*. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as

(1) *Marshall* v. *Ross*, Law Rep. 8 Eq. 651.

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being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation however restrictive it is, provided that restriction in the judgment of the Court is not unreasonable, having regard to the subject matter of the contract.

Now in this case the subject matter of the contract was a particular manufacture carried on partly under patents and partly by processes which, it is to be assumed, were not known except to the vendors themselves and their agents and workmen. That being the subject matter of the contract, the stipulation is, that the vendors will not set up a similar manufacture in *Europe*, and will not communicate the process of the manufacture anywhere so as to interfere with the enjoyment by the intended company of the benefits thereby agreed to be purchased. This case, as it seems to me, much more resembles the sale of a secret, which has been held to be perfectly good, with a stipulation unlimited as to time and place as to communicating the secret, or dealing with it so as to interfere with the purchaser. It is settled by authority that a man may bind himself not to communicate that process to anybody else anywhere, under any circumstances, in any part of the world. But how would it be possible to enforce such a covenant as that—not to communicate the process—if he were at the same time to be at liberty to carry on that same trade with the same processes in such a way that they would have to be communicated to every servant and workman engaged by him in the trade? He

is entitled to restrain himself from communicating, and is thereby enabled to get a higher price for that which he is selling. The fact that he is so entitled to restrain himself from communicating the process, entitles him also to restrain himself from carrying on a manufacture which would involve the communication of the process. Independently, therefore, of those words, "so as in any way to interfere with the exclusive enjoyment," I am of opinion that there is nothing in this covenant which violates the rules of law, or which is in contravention of the decided cases, when the principles upon which those cases have been decided come to be properly considered. But if there were anything in a covenant so standing which might be supposed to be in contravention of some of the decided cases, I am satisfied that those words, "so as in any way to interfere with the exclusive enjoyment of the company," do properly and sufficiently modify and qualify it: the principle being that you are not to have any more restraint than is necessary for the benefit of the purchasers; the company say, we do not ask for any unreasonable or capricious restraint upon you; we only ask you to bind yourself not to do something which will interfere with that which you profess to sell to us, and for which you have received a consideration. I am of opinion, therefore, that the covenant is one capable of being enforced in this Court.

The next question is, has the Defendant *Lorsont* been doing anything in violation of that covenant? I am of opinion that he is doing so, that he is engaged in a manufactory for the manufacture of productions similar to those which were the subject of the letters patent, and which were then manufactured in the manufactory so carried on at *West Ham* at the time of the contract; that is to say, it is proved to me that the particular production is the production of an article known as *Crockett's* leather cloth; that *Crockett's* leather cloth was manufacured at that time; that *Crockett's* leather cloth, called by that very name, is manufactured by the Defendant, and sold by him under that very name, with an advertisement to the effect that the goods supplied by him are in every respect similar to those made by the *Crockett Leather Cloth Company* while the works were under his management, and so on. Having covenanted that he would not be engaged in the manufacture of products similar to those which were then being made, he circulates

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to the world a letter stating that he is now actually making productions which are in every respect similar to those which were made by the vendors and afterwards made by the purchasers.

I am of opinion, therefore, that the Plaintiffs are entitled to an injunction. They are also entitled to the costs of the suit, except so far as they have been occasioned by the litigation as to the three trade marks, as to which I should have given the Defendant the costs if he had not himself been personally concerned in the introduction and use of them by the company. I do not give him any costs, but he will not have to pay any costs in respect of that part of the suit. He must pay the costs of the rest of the suit.

Solicitors: Messrs. *Thomas & Hollams*; Messrs. *Combe & Wainwright.*

V.-C. J. 1870 *Jan.* 20.

FINNEY *v.* GODFREY.

Practice—Pro Confesso—11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 36—*Parish Church.*

The direction contained in 7 Will. 4 & 1 Vict. c. 45 (amending 11 Geo. 4 & 1 Will. 4, c. 36), that prior to taking a bill *pro confesso* against an absconding Defendant the order for his appearance by a certain day shall be posted on the door of the parish church of the parish where the Defendant made his usual abode within thirty days before absconding, is conditional upon such last abode having been parochial, and may be dispensed with in the case of an extra-parochial residence.

THIS was an *ex parte* application for an order under 11 Geo. 4 & 1 Will. 4, c. 36, for the appearance by a certain day of one of the Defendants who had absconded, in order that in default of appearance the bill might be taken *pro confesso* against him. A difficulty arose in the case from the fact that the last place of residence to which the Defendant had been traced was *Barnard's Inn*, which is extra-parochial, and the Act 11 Geo. 4 & 1 Will. 4, c. 36, directs (sect. 3) that the order for the appearance of the Defendant shall be "published on some Lord's Day immediately after divine service in the parish church of the parish where such Defendant made his usual abode, within thirty days next before such his absenting,"

and also "shall be posted up in some public place at the *Royal Exchange* in *London*." By a later Act, 1 Vict. c. 45, s. 2, it is enacted that "all proclamations or notices which under or by virtue of any law or statute . . . have been heretofore made or given in churches or chapels during or after divine service shall be reduced into writing, and copies thereof . . . shall be affixed on or near to the doors of all the churches and chapels within such parish or place."

Mr. *Hastings*, in support of the application, mentioned the difficulty in complying with the requirements of the Act of Parliament, from the fact that the last place of abode of the Defendant was not in any parish, and suggested that the order might be posted on the door of the chapel in *Barnard's Inn*. There was no provision in the Act for the mode of publishing the order in extra-parochial places.

SIR W. M. JAMES, V.C.:—

It must, I think, in construing the Act, be taken that posting the order upon the parish church is conditional upon there being a parish church. It will be sufficient in this case to direct that the order be posted up on the door of *Barnard's Inn* chapel (1), and in some public place at the *Royal Exchange*.

Solicitors: Messrs. *Deane & Chubb*.

(1) It was stated in support of the application that there is a chapel in *Barnard's Inn*, but this was found to be an error. The case was not, however, again mentioned.

M. R.

1870

March 5, 7, 8.

CARDIGAN *v.* CURZON-HOWE.

Settlement of Family Plate—Resulting Trust—Gift by Implication—Gift over —Construction.

By a settlement made in 1811, the *Cardigan* family plate was settled upon trust for *Robert*, then Earl of *Cardigan*, for life, and after his decease for *James Thomas* Lord *Brudenell*, the son and heir apparent of *Robert* Earl of *Cardigan*, for his life, and after his decease in trust for the first son of the body of *James Thomas* Lord *Brudenell*, his executors and assigns; but if such first son should die under twenty-one, without leaving issue male living at his death, then for the second son, his executors, administrators, and assigns, with like executory trusts in favour of the other sons of *James Thomas* Lord *Brudenell;* and if he should not have any son or sons, or having such all of them should die under twenty-one, and some of them should leave issue male living at his death, then in trust for the second son of *Robert* Earl of *Cardigan*, his executors, administrators, and assigns; but if such second son should die under twenty-one without leaving issue male living at his death, then in trust for the third and other sons of *Robert* Earl of *Cardigan;* and if there should not be any son of the said *Robert* Earl of *Cardigan*, or the said *James Thomas* Lord *Brudenell*, who should live to attain the age of twenty-one years or should die under that age leaving issue male living at his death, then in trust for the settlor.

Robert Earl of *Cardigan* had only one son, *James Thomas* Lord *Brudenell*, who attained twenty-one, and died without issue:—

Held, that upon his death, the ultimate trust in favour of the settlor took effect, the words "any son" in the gift over being read "any such son as is hereinbefore mentioned."

THIS was a suit for the administration of the estate of *James Thomas*, seventh Earl of *Cardigan*. An application was now made on behalf of the Duke of *Buccleuch* for delivery to him of certain pieces of silver plate which had been settled by *Elizabeth* Duchess of *Buccleuch*, or, if the plate should not be forthcoming, then that the estate of the Earl of *Cardigan* should make good the value thereof.

Elizabeth Duchess of *Buccleuch* was the only child of *George* Duke of *Montague* and fourth Earl of *Cardigan;* and under the will of her father she became entitled to the plate in question (which was the *Cardigan* family plate), for her separate use.

By a deed dated the 8th of June, 1791, the plate was assigned by the Duke and Duchess of *Buccleuch* to trustees upon trust to

permit the same to be used and enjoyed by *James*, fifth Earl of *Cardigan*, during his life, and after his decease by *Elizabeth* Countess of *Cardigan*, during her life; and after the decease of the survivor of them in trust for the first son of *James*, fifth Earl of *Cardigan*, and the executors, administrators, and assigns of such first son; but if such first son should die under twenty-one without leaving issue male of his body living at his decease or born alive afterwards, then in trust for the second son of *James*, fifth Earl of *Cardigan*, his executors, administrators, and assigns, with like executory gifts in favour of the third, fourth, and other sons; and if *James*, fifth Earl of *Cardigan*, should not have any son or sons, or having such all of them should die under the age of twenty-one years, and none of them should have issue male of his body living at his death or born alive afterwards, then in trust for *Elizabeth* Duchess of *Buccleuch*, her executors, administrators, and assigns, for her separate use.

James, fifth Earl of *Cardigan*, died on the 24th of February, 1811, without issue, but leaving *Elizabeth* Countess of *Cardigan* his widow. He was succeeded in his title by *Robert*, sixth Earl of *Cardigan*, who had one son, *James Thomas* Lord *Brudenell*, afterwards seventh Earl of *Cardigan*.

By a deed dated the 15th of June, 1811, *Elizabeth* Duchess of *Buccleuch*, with the concurrence of her husband, directed that the plate should be held by the trustees of the deed of 1791 (subject to the use and enjoyment thereof by *Elizabeth* Countess of *Cardigan*) upon the following trusts:—"In trust to permit and suffer the same to be used and enjoyed by the said *Robert*, now Earl of *Cardigan*, during his life, and from and after his decease by the Right Honourable *James Thomas Brudenell* (commonly called Lord *Brudenell*, only son and heir apparent of the said *Robert* Earl of *Cardigan*,) and now an infant of the age of years or thereabouts, during his life, and from and after his decease, shall stand possessed of and interested in the said service of plate and other things in the said schedule mentioned and comprised, and the said *épergne* or fruit basin and stand, in trust for the first son of the body of the said *James Thomas* Lord *Brudenell*, and the executors, administrators, and assigns of such first son: provided that if such first son shall die under the age of twenty-one years, without leaving issue male

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of his body living at his decease or born alive afterwards, then in trust for the second son of the body of the said *James Thomas* Lord *Brudenell*, and the executors, administrators, and assigns of such second son: provided that if such second son shall die under the age of twenty-one years without leaving issue male of his body living at his death, or born alive afterwards, then in trust for the third, fourth, and other sons and son of the body of the said *James Thomas* Lord *Brudenell*, severally and successively according to priority of birth, and their respective executors, administrators, and assigns, subject nevertheless as to each such son to the like proviso as hereinbefore is contained as to the first and second sons of the said *James Thomas* Lord *Brudenell;* and if the said *James Thomas* Lord *Brudenell* shall not have any son or sons, or having such all of them shall die under the age of twenty-one years, and none of them shall leave issue male of his body living at his death or born alive afterwards, then in trust for the second son of the body of the said *Robert*, now Earl of *Cardigan*, if he shall have another son, and the executors, administrators, and assigns of such second son: provided that if such second son shall die under the age of twenty-one years, without leaving issue male of his body living at his death or born alive afterwards, then in trust for the third, fourth, and all and every other the sons and son of the said *Robert* now Earl of *Cardigan*, severally and successively according to priority of birth, and their respective executors, administrators, and assigns; subject nevertheless, as to each such son, to the like proviso as hereinbefore is contained as to the second son of the said *Robert* Earl of *Cardigan;* and if there shall not be any son of the said *Robert* Earl of *Cardigan*, or of the said *James Thomas* Lord *Brudenell*, who shall live to attain the age of twenty-one years, or shall die under that age leaving issue male of his body living at his death, or born alive afterwards, then in trust for the said *Elizabeth* Duchess of *Buccleuch* and *Queensberry*, her executors, administrators, and assigns, for her sole and separate use."

Robert, sixth earl of *Cardigan*, had no other son than *James Thomas*, seventh Earl of *Cardigan*, the testator in the cause, who attained twenty-one and died without issue.

The plate was delivered to *Robert*, sixth Earl of *Cardigan*, and

enjoyed by him during his life. It was a matter in dispute whether the plate was traced into the possession of *James Thomas*, seventh Earl of *Cardigan*, but upon the evidence the Court was of opinion that it was so traced.

The Duke of *Buccleuch* was the legal personal representative of *Elizabeth* Duchess of *Buccleuch*, and beneficially entitled to her property; and the present claim was made in the names of him and of the legal personal representative of the last surviving trustee of the deeds of 1791 and 1811.

Mr. *Southgate*, Q.C., and Mr. *Cust*, for the claimants, contended that the Duke of *Buccleuch* was entitled to the property, either under the express words of the ultimate trust in the deed of 1811, or if not, under a resulting trust in favour of the settlor.

Sir *R. Baggallay*, Q.C., Mr. *Jessel*, Q.C., Mr. *Swanston*, Q.C., Mr. *Bovill*, Mr. *Winterbotham*, and Mr. *Marten*, for the executors of the late Earl of *Cardigan* and persons claiming beneficially under his will:—

It was the clear intention of the settlor that the plate should be held, so far as the rules of law would permit, by the Earl of *Cardigan* for the time being; and the Court will not give effect to any resulting trust which would be contrary to that intention. The gift over can take effect only in particular events specified in the deed, and that event has not happened; for one son of *Robert* Earl of *Cardigan* has attained twenty-one, viz., *James Thomas*, the seventh Earl. There is an implied gift in favour of *James Thomas*: *Ex parte Rogers* (1); *Harman* v. *Dickenson* (2); *Dowling* v. *Dowling* (3); *Wainewright* v. *Wainewright* (4).

It is true that *Ex parte Rogers* has been adversely commented on, but not in cases where there is a clear intention to benefit a particular class.

Mr. *Southgate*, in reply, on the question of construction:—

How can an absolute gift be implied in favour of *James Thomas* when the deed contains an express gift to him for life?

(1) 2 Mad. 449.
(2) 1 Bro. C. C. 91.
(3) Law Rep. 1 Eq. 442; Ibid. 1 Ch. 612.
(4) 3 Ves. 558.

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There is nothing in the deed about *James Thomas* not attaining twenty-one; but the gift over is to take effect if a son does not attain twenty-one. The gift over must be construed by reference to the previous limitations: *Malcolm* v. *Taylor* (1); *Ellicombe* v. *Gompertz* (2); *Bryan* v. *Mansion* (3); *Abbott* v. *Middleton* (4).

All the cases cited on the other side are overruled. *Ex parte Rogers* is now overruled: *Jarman* on Wills (5); *Neighbour* v. *Thurlow* (6). Again *Harman* v. *Dickenson* (7) is overruled by *Hodge* v. *Foot* (8). In *Dowling* v. *Dowling* (9) Vice-Chancellor *Stuart* held there was a gift by implication, but the Lords Justices reversed his decision on appeal.

If there be a gift by implication, where does it come in? Before the gift to the sons of *James Thomas* or after? Before the gift to his younger brothers or after? In fact, an attempt is being made to make a new settlement, not to construe the existing one.

March 8. LORD ROMILLY, M.R.:—

There is really no question that in this case the failure of issue mentioned in the deed must mean the failure of such issue as is before mentioned. On the cases cited to me, which I have carefully examined, there is no doubt that this is the true construction, and it would be idle to go further into it. The limitation to the Duchess of *Buccleuch* took effect, and therefore the plate must go to the claimant, or if it is not forthcoming he must have the value of it out of the late Earl of *Cardigan's* estate, and I will direct an inquiry for the purpose of ascertaining the value.

Solicitors: Messrs. *Nicholl, Burnett, & Newman;* Messrs. *Bloxam, Ellison, & Bloxam;* Messrs. *Duncan & Murton.*

(1) 2 Russ. & My. 416.
(2) 3 My. & Cr. 127, 152.
(3) 5 De G. & Sm. 737.
(4) 7 H. L. C. 68.
(5) Vol. i. p. 527.
(6) 28 Beav. 33.
(7) 1 Bro. C. C. 91.
(8) 34 Beav. 349.
(9) Law Rep. 1 Eq. 442; Ibid. 1 Ch. 612.

In re NORWEGIAN CHARCOAL IRON COMPANY.

MITCHELL'S CASE.

M. R.
1870
Jan. 15, 17.

Contributory—Infant Transferee—Acquiescence—Transfer to Trustee.

A person to whom shares in a company had been transferred while he was an infant, became adult nearly two years before the company commenced to be wound up; and during that time took no steps to repudiate the shares though proceedings had been taken to enforce calls:—

Held, that he was a contributory.

A shareholder transferred shares standing in his own name into the name of an infant as trustee for himself, nearly three years before the company commenced to be wound up. The company, though they had means of knowing the nature of the transaction, registered the transfer, and made no objection before the winding-up:—

Held, that the trustee was a contributory, and not the *cestui que trust*, and that neither the trustee nor the official liquidator was entitled to have the register altered.

THE *Norwegian Charcoal Iron Company, Limited*, was registered under the *Companies Act*, 1862, on the 1st of September, 1864. *James Mitchell* applied for and obtained an allotment of 100 shares, and he paid £700 in respect of calls thereon.

On the 6th of August, 1865, *Mitchell* executed a transfer of eighty of those shares, for a nominal consideration, to *Francis Henry Vandyke*, who was at the time an infant under the age of twenty-one years, and a clerk in the office of Mr. *George Forster*, a stockbroker, and the transfer was duly registered. There was some evidence to shew that at this time the shares might have been sold in the market for value, but it was contended that the object of the transfer was to escape liability. It was a matter of dispute whether or not the transfer was out and out, *Vandyke* alleging that he took the shares simply as trustee for *James Mitchell*, and upon an express promise by him that the shares should in a short time be taken out of *Vandyke's* name. *James Mitchell* died in May, 1866. On the 13th of September, 1866, *Vandyke* attained the age of twenty-one years. Shortly afterwards legal proceedings were taken by the company for the purpose of recovering from *Vandyke* the arrears of calls due on his shares, and he being in pecuniary

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difficulties, and having no means of meeting the company's demands, applied to *William Mitchell*, one of the executors of *James Mitchell*, for assistance, and received some small sums of money from him. *Vandyke* alleged that these sums were given to enable him to keep out of the way of proceedings by the company, and to suspend taking any steps to repudiate the shares until some arrangement could be come to with reference thereto; *William Mitchell*, on the other hand, alleged that the sums were given out of charity. Subsequently, further applications were made to him on behalf of the company for payment of the calls due on the shares; but he neither paid the calls nor took any steps to repudiate his liability in respect thereof.

On the 22nd of June, 1868, the eighty shares were declared forfeited for non-payment of calls.

By a resolution passed on the 28th of June, and confirmed on the 9th of July, 1868, it was resolved that the company should be wound up voluntarily.

Two summonses were taken out, one by *Vandyke* and the other by the liquidator, seeking to rectify the register by substituting the names of the executors of *James Mitchell* as the holders of these eighty shares for the name of *Vandyke*.

By the articles of association the directors were empowered to reject a transfer only in the case of the transferor being indebted to the company. At the date of the transfer to *Vandyke*, *James Mitchell* was not so indebted.

The Court was of opinion that *Vandyke* was a trustee for *Mitchell*; and that the company were aware, when they registered the transfer, that *Vandyke* was an infant, and also that there was some arrangement between him and *Mitchell* with respect to the shares.

Sir *R. Baggallay*, Q.C., and Mr. *Ferrers*, for *Vandyke* and the liquidator:—

First, as to *Vandyke's* summons. He was an infant at the time of the transfer, and he has never done anything to affirm the transaction, and is therefore entitled to be removed from the register: *Wilson's Case* (1).

Second, as to the liquidator's summons. The transfer was clearly

(1) Law Rep. 8 Eq. 240.

made with the view of escaping liability, and it was not out and out; and therefore the transferor remains liable: *Costello's Case* (1). The lapse of time does not prejudice the right to rectify the register: *Hunt's Case* (2).

Mr. *Jessel*, Q.C., and Mr. *Oswald*, for *Mitchell's* executors:—

First, as to *Vandyke's* summons. He attained twenty-one nearly two years before the commencement of the winding-up, and during the whole of that time he took no steps to repudiate the shares; he is therefore bound: *Lumsden's Case* (3); *Dublin and Wicklow Railway Company* v. *Black* (4). In *Wilson's Case* (5) the infant did not attain twenty-one until after the winding-up had commenced.

As to the liquidator's summons. The only evidence in support of the contention that *Vandyke* was a trustee is that of *Vandyke*. It is most improbable that an infant should be chosen as a trustee. The doctrine of *Costello's Case* applies only to companies *in extremis*. While a company is a going concern a shareholder has a right to transfer to whomsoever he pleases. There was no deception in the matter; the shares were transferred for a nominal consideration.

Sir *R. Baggallay*, in reply.

Jan. 17. LORD ROMILLY, M.R.:—

In this case certain shares are taken by an infant and are transferred to him. The company have full opportunity of knowing that he is an infant, and, in fact, they know everything about him. After he attains the age of twenty-one he is perfectly well aware that these shares are standing in his own name, and he remains for two years doing nothing whatever, receiving applications from the company, but never repudiating the shares. Now I have held that if a person becomes adult, either immediately after the winding-up or immediately before, and takes no step, that he cannot be blamed for so doing, because he cannot tell whether the company intend to enforce their claim against him, and that therefore he is

(1) 2 D. F. & J. 302. (3) Law Rep. 4 Ch. 31.
(2) 32 Beav. 387. (4) 8 Exch. 181.
(5) Law Rep. 8 Eq. 240.

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not bound, till some steps are taken, to resist his being a shareholder in the company; but when he remains for two years and is constantly applying to the executors of the person who had transferred the shares to him, he is bound to tell the company that he repudiates the shares and will have nothing to do with them.

Then I think the contention of the official liquidator fails in this respect. The distinction is very properly drawn between a person who wants to get rid of his shares because the company happens to be a failing company, and a person who wishes to put them in the name of a trustee. This takes place not unfrequently in many of these companies, as the company refuses to acknowledge any trusts. Now, Mr. *Mitchell* takes these shares and transfers a large number of them (eighty, I think) into the name of the infant, with the knowledge of the infant, the infant being perfectly well aware of it, and allowing the thing to be done. I have considered the question whether he could repudiate them or not, but now comes the question whether that is a valid transaction. For that purpose the question of infancy does not arise; it is the same question exactly as it would be between two adult parties. One person may, if he pleases, become a trustee for another. He knows the consequences of so doing. He knows that he becomes personally liable for the calls, and that he is personally liable to be made a contributory. There are two sets of rights; one is as between himself and the person whom I may call the *cestui que trust*, and the other is as between himself and the company. As between himself and the company he is a shareholder and a contributory, and cannot resist anything; but as between himself and the person for whose benefit he agreed to take them he has a right over as against him; that is to say, he has a right to call upon him who is the real owner of the shares to make good any sums of money which he may have to pay for the calls, or for contribution or the like. Consequently he may be entitled to come against Mr. *Mitchell's* estate to make good anything which he will have to pay in the course of this liquidation to the company; but that does not prevent him from being the contributory to the company, or from, in his own person, making good those sums which he may be properly called upon to pay; and the company cannot come against the person in whose

name they do not stand by reason of an arrangement made between two other persons, which they have not opposed or resisted, and of which they knew a great deal. Whether they could have opposed it at the time is not the question now.

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The result is, that I must keep him on the list of contributories as he remains at present, and that I must dismiss the application. I think the costs of all parties must come out of the estate.

Solicitors: Messrs. *Hollingsworth, Tyerman, & Green;* Messrs. *Johnson & Weatheralls.*

In re MASSEY.

In re FREEHOLD LAND AND BRICKMAKING COMPANY.

M. R. 1870 Feb. 19.

Company—Winding-up—Costs of Winding-up—Remuneration of Liquidator—Solicitor's Bill.

An official liquidator is not entitled to receive anything out of the assets of a company by way of remuneration until all the costs of the winding-up (including the bill of costs of the solicitor employed by him) have been paid in full.

THIS was a Petition by *Thomas Massey*, a solicitor, alleging that he had been retained by *George Scott*, the official liquidator of the *Freehold Land and Brickmaking Company, Limited*, now in course of liquidation, to act as his solicitor in relation to the winding-up, and that he had acted as such solicitor, and that by his exertions in that capacity property of considerable amount had been recovered or preserved; and the Petition prayed that the Petitioner might be declared to be entitled to a lien on the assets of the company for the amount of his bill of costs; and that the official liquidator might be ordered to pay personally so much of the said amount as the assets of the company were insufficient to satisfy.

The official liquidator's case was, that an agreement had been made between him and *Massey* that the latter should look to the assets of the company for payment of his costs, and that if the assets should prove to be insufficient (as was the case), the costs out of pocket of the solicitor and the liquidator should be paid thereout in the first instance, and that the surplus should be rateably divided between them.

M. R. 1870 — *In re* Massey. — *In re* Freehold Land and Brickmaking Company.

At the hearing, so much of the Petition as sought to enforce personal payment of the costs was abandoned; and the Court was of opinion that the agreement as to the division of the assets was not established.

Mr. *Jessel*, Q.C., and Mr. *Holmes*, for the Petitioner, said that the assets consisted partly of sums of money recovered from shareholders by means of balance orders, and partly of a sum paid by a shareholder named *Kent*, who had instituted a suit against the company to be relieved of his shares, and upon the dismissal of his bill had paid the amount in question in accordance with the terms of a compromise sanctioned by the Court; and they claimed a lien on all these sums under 23 & 24 Vict. c. 127.

Lord Romilly, M.R.:—

Where there is a suit such as that of *Kent* v. *Freehold Land and Brickmaking Company*, by means of which a fund is recovered to the company, then the solicitor is entitled to claim a lien for his costs on that fund against every one; but as to sums which were in the hands of the company before the commencement of the winding-up, or the general assets of the company, the solicitor has nothing to do with them. However, the question of lien does not appear to me to arise here at all: it is simply a question between the official liquidator and his solicitor how the assets of the company shall be applied. A question of lien only arises where some one can put the fund in his own pocket, and there is no such person here. The fund in Court is applicable to pay the costs of the winding-up and the remuneration of the official liquidator, but the official liquidator cannot get any remuneration until all the costs of the winding-up are paid.

Mr. *Roxburgh*, Q.C., and Mr. *D. Jones*, for the official liquidator, submitted that there was no case which decided that the official liquidator was not entitled to any remuneration until all the costs of the winding-up were paid; and that the case of *In re Audley Hall Cotton Spinning Company* (1) was an authority to the contrary. On principle, there was no reason why the solicitor and

(1) Law Rep. 6 Eq. 245.

official liquidator should not be remunerated *pari passu*, inasmuch as it was by the exertions of both that the assets of the company had been recovered. They further submitted that, at all events, the official liquidator must be paid his costs out of pocket *pari passu* with the solicitor's bill.

Mr. *Jessel*, in reply.

LORD ROMILLY, M.R.:—

In the absence of any special agreement I consider that these costs are to be paid according to law; and the rule of the Court is this, that in the first place the costs of the petition for winding-up are to be paid out of the assets, next the costs of the winding-up, and then the remuneration of the official liquidator; but no remuneration can be given until all the costs of the winding-up are paid, including the costs of any provisional liquidator who may have been properly appointed. The bill of costs of the solicitor is part of the costs of the winding-up, and if the official liquidator has paid any costs out of pocket he may be entitled to be repaid out of the assets *pari passu* with costs similarly paid by the solicitor; but I do not go into that question now. There is no agreement in this case to take it out of the ordinary rule. I consider that this Petition is wholly unnecessary, as the real question between the parties might have been raised and settled on a summons at Chambers. It has been met by a defence, in my opinion, equally unnecessary; and therefore I make no order on the Petition.

Solicitors: Messrs. *Stuart & Massey*; Mr. *A. Cox*.

M. R.
1870
March 22, 23.

In re PROGRESS ASSURANCE COMPANY.
Ex parte LIVERPOOL EXCHANGE COMPANY.

Company—Distress after winding-up Order—Companies Act, 1862, *s.* 163.

Where offices had been let to a company which was ordered to be wound up by the Court, a distress was subsequently put in for rent by the lessors, under which the office furniture was seized:—

Held, that as possession of the offices had not, in the opinion of the Court, been retained for the purpose of the company's business, the distress was illegal under s. 163 of the *Companies Act*, 1862, and that the lessors were only entitled to prove for the amount due to them.

THE question in this case was, whether the *Liverpool Exchange Company*, who were the lessors of certain offices, which were let under an agreement to the *Progress Assurance Company*, were entitled to put in a distress for non-payment of rent under the following circumstances:

On the 22nd of June, 1869, an order was made for winding-up the *Progress Assurance Company*. After the date of the winding-up order the assurance company retained possession of the offices, and in September, 1869, the *Exchange Company* issued a distress for the amount of rent then due to them, under which they seized the furniture of the assurance company which was left in their offices. On the 19th of November following possession was taken by the *Exchange Company*. There was some conflict of evidence as to the purpose for which possession had been retained. On the one side it was stated that it was for the purpose of the liquidation, but this was denied by the official liquidator. The furniture seized under the distress was sold, and the proceeds, amounting to £152, were by arrangement paid to a separate account till the rights of the parties were determined. The total amount of rent due to the 19th of November, 1869, was £318.

The official liquidators of the assurance company contended that the distress was illegal under sect. 163 of the *Companies Act*, 1862, and the matter came before the Chief Clerk, who considered that the *Liverpool Exchange Company* were entitled to receive the sum of £152, and to prove for the remainder of their claim against the assurance company.

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Sir *R. Baggallay*, Q.C., and Mr. *Robinson*, for the *Progress Assurance Company*:—

The distress put in by the *Liverpool Exchange Company* was contrary to the provisions of sect. 163 of the *Companies Act*, 1862, which provides that "where any company is being wound up by the Court, any attachment, sequestration, distress, or execution put in force after the commencement of the winding-up shall be void to all intents." In the case of *Re Exhall Mining Company* (1) the Lords Justices considered that a distress put in for rent upon the property of a company in liquidation might be realized, notwithstanding the 163rd section; but there, though the distress had been put in after the presentation of a winding-up petition, yet it was before the making of the winding-up order: in the present case the distress was put in after the order.

Mr. *Jessel*, Q.C., and Mr. *Rowcliffe*, for the *Liverpool Exchange Company*:—

The distress in this case should not be set aside. The 163rd section of the Act was intended to prevent fraudulent preference, and is controlled by the 87th section. In the case of *In re London Cotton Company* (2), it was held that, notwithstanding the provisions of the 163rd section, the Court had power under the 87th section, where a winding-up order had been made, to give leave to a creditor to proceed with an execution; and there Vice-Chancellor *Wood*, who considered that the case was governed by the authority of *In re Great Ship Company* (3), observed (4): "If the 163rd and subsequent sections on the subject of fraudulent preference are examined, it will be found that the Act contemplates certain acts of fraud which sometimes take place in bankruptcy, and protects the creditors against those acts, and also against a race among creditors who may be pulling the estate to pieces. In such a case the Act says the proceedings shall be void." The same view was taken by Vice-Chancellor *Malins* in the case of *In re Bastow & Co.* (5). These were cases which arose on execution, but they are equally applicable to distress.

(1) 4 N. R. 127. (3) 12 W. R. 117; 3 N. R. 181.
(2) Law Rep. 2 Eq. 53. (4) Law Rep. 2 Eq. 58.
(5) Law Rep. 4 Eq. 681.

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In re Progress Assurance Company. *Ex parte* Liverpool Exchange Company.

[The Master of the Rolls:—In those cases the execution was issued before the date of the winding-up order, though it was not levied till afterwards.]

By sect. 164 the commencement of the winding-up is made for the purposes therein mentioned to date from the presentation of the Petition. We admit that the distress can be avoided under sect. 163, but contend that it is in the discretion of the Court, which would not be exercised for that purpose here.

In the present case the evidence shows that there has been a beneficial occupation on the part of the liquidator, who has retained possession of the offices, and cannot, therefore, avoid the distress for non-payment of the rent.

Sir *R. Baggallay*, in reply:—

I admit that the 163rd section must be construed with the 87th, and that where, either before a Petition for winding-up or between a Petition and the winding-up order, a distress or execution has issued, there the Court will exercise its discretion as to allowing it to proceed. In the cases cited on the other side the step had been taken before the order was made, and they have no application to the present case where the distress was issued subsequently to the order. With regard to the occupation of the offices: where for the purpose of administration it is desirable to retain possession of the offices, the rent is looked upon as part of the administration expenses; but here possession was not so retained. The *Exchange Company* can only prove *pari passu* with other creditors.

March 23. Lord Romilly, M.R.:—

I am of opinion that this case is governed by sect. 163 of the *Companies Act*, 1862, and that the *Liverpool Exchange Company* must prove for the amount of their debt.

In all the cases in which an execution or distress has been allowed, it has issued before the date of the winding-up order. The only exception to the operation of the section when distress is issued after the winding-up order is where the company has retained, not merely formal, but actual possession of the property for the

purpose of carrying on the business of the liquidation; but here the offices were retained for the benefit of all parties, and the *Exchange Company* never required possession to be given up to them till the 19th of November.

The distress was one that could not be allowed under the section, and the order will be that the *Exchange Company* are at liberty to prove for the rent due up to the time when they took possession.

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Solicitor for the *Progress Assurance Company*: Mr. *H. W. Mackreth*, agent for Messrs. *Hull, Stone, & Fletcher, Liverpool.*

Solicitors for the *Liverpool Exchange Company*: Messrs. *Gregory & Co.*, agents for Messrs. *Duncan & Co., Liverpool.*

In re WINTLE.

M. R. 1870 *Jan.* 29.

*Evidence—Date of Birth—Register—Entry—*6 & 7 *Will.* 4 *c.* 86.

The entry in a register of births under 6 & 7 Will. 4, c. 86, is evidence of the birth having taken place before the date of registration, but not of the exact date of birth.

THIS was a Petition for the payment out of Court of a fund payable to the Petitioner on attaining twenty-one. The only evidence of the age of the Petitioner was a duly certified copy of the entry of the birth in the register kept under the provisions of 6 & 7 Will. 4, c. 86. In this entry the date of birth was stated to be the 23rd of January, 1849, and the date of registration the 13th of February following.

Mr. *Phear*, for the Petitioner, contended that by 6 & 7 Will. 4, c. 86, the certificate was sufficient evidence of the date of birth. By sect. 18 every registrar is required to inform himself of every birth within his district, and to have registered certain particulars stated in the form given in schedule A. to the Act; and among such particulars are the date of the birth and the residence and description of the informant. By sect. 38 it is provided that duly certified copies of the entries in the registrar's book shall be received as evidence of the birth. By sect. 41 any person wilfully

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making a false statement, for the purpose of being inserted in any register, touching any of the particulars required to be known and registered, is made subject to the same penalties as if he had committed perjury.

It thus appears that all the particulars stated in the certificate rest on the statement of some informant, who is liable to prosecution if he wilfully makes a false statement; and the Act which makes the certificate evidence of birth must be considered as making it also evidence of all the particulars stated therein.

Mr. *Hance*, for the trustees of the fund.

LORD ROMILLY, M.R.:—

The Act makes the entry in the register evidence of the fact of birth, and nothing more; and therefore I have always held that it is evidence only of the child having been born before the entry was made. You are at liberty to adduce further evidence as to the date of the birth, but unless you do so the order cannot be made until the 13th of February.

Solicitor: Mr. *Charles Blake.*

M. R. 1870 *March* 5

In re SMITH'S TRUSTS.

Trustee Relief Act—Costs of Trustees—Income and Corpus.

Upon a Petition by a tenant for life for payment of the income of a fund paid into Court under the *Trustee Relief Act*, the costs of the trustees are payable out of the income and not out of the *corpus* of the fund.

THIS was the Petition of the tenant for life of a fund paid into Court under the *Trustee Relief Act* for payment of the income; and the question was raised whether the costs of the trustees were to be paid out of the income or the *corpus* of the fund.

Mr. *Lawson*, for the Petitioner:—

In *In re Marner's Trusts* (1) it was laid down that the costs of the

(1) Law Rep. 3 Eq. 432.

Petition were to be paid out of the income; but in *In re Gordon's Trusts* (1), Vice-Chancellor *Malins* held that this rule did not apply to the costs of trustees, which were in that case directed to be paid out of *corpus*. However, in *In re Whitton's Trusts* (2) Vice-Chancellor *James* held, that the costs of the trustees were payable out of income.

Mr. *Leeson*, for the Respondents.

The MASTER OF THE ROLLS said he had always followed the rule laid down by Vice-Chancellor *James*, and made an order accordingly.

Solicitors: Mr. *W. H. Holland;* Messrs. *Hensman & Nicholson.*

(1) Law Rep. 6 Eq. 335. (2) Law Rep. 8 Eq. 352.

V.-C. M.
1870
Feb. 11.

HALL *v.* LIETCH.

Will—Construction—Implied Gift—Mis-recital.

A testator, being entitled to a policy of assurance for £500 on the joint lives of himself and his wife, bequeathed all his personal estate, "save and except the sum of £500 payable at my death, under a policy of insurance, to my wife, and to which she is absolutely entitled under the said policy," to trustees, upon trust for his wife for life, and for his children after her death:—

Held, that the £500 payable under the policy was given, by implication, to the widow absolutely by the will.

THIS was a special case.

Robert Hall, by his will, bequeathed all his personal estate which he should be possessed of or entitled to at his death (with an exception in these words, "save and except the sum of £500 payable at my death, under a policy of insurance to my wife *Hannah Hall*, and to which she is absolutely entitled under the said policy,") to his executors, of whom his wife was one, upon trust, for the benefit of his wife for life, and, after her death, of his children then living.

The only policy of assurance which the testator possessed was a policy on the joint lives of himself and his wife for £500, payable to the testator on his wife's death, if he survived her, and to his legal personal representatives on his death, if he predeceased her. His wife had no interest in the policy.

The question in the special case was whether, under the will, the £500 receivable under the policy was payable to the testator's widow, or whether it formed part of the testator's general estate, and ought to be held by the trustees upon the trusts declared of the testator's personal estate.

Mr. *Crossley*, for the Plaintiff, the widow, after stating the case, was stopped by the Court.

Mr. *W. Barber*, for the Defendants, the other executors and trustees:—

The testator has excepted the £500 payable under the policy

from the general bequest of his personal estate, under the erroneous impression that his wife would be entitled to it under the policy, but he has made no disposition of it. It is impossible to say how he would have disposed of this money if he had known that it would be part of his estate, and there is no reason to assume that he would have given it to his wife absolutely, rather than that he would have given her a life interest only in this as in the rest of his property.

SIR R. MALINS, V.C. :—

The testator having effected this policy on the joint lives of himself and his wife, made his will under the erroneous impression that his wife, if she survived him, would be entitled to the policy money, and, accordingly, he excepts from the general bequest of his personal estate "the sum of £500 payable under a policy of insurance to my wife *Hannah Hall*, and to which she is absolutely entitled under the said policy." I think that this must be construed as shewing the intention of the testator that his wife should take the £500 absolutely; if the policy did not give it her she was to take it under the will. It is just as if a testator had by a codicil disposed of all his personal estate, "except £500, which I have given to *A.* by my will," and he had not given £500 to *A.* by his will; that would give the £500 to *A.* by implication. The answer to the question, therefore, will be that upon the true construction of the will the £500 is payable to the Plaintiff.

Solicitor: Mr. *J. Tucker.*

V.-C. M.

1870

Feb. 25.

In re CLARK'S TRUSTS.

Will—Survivorship—Divesting Clause—Death in Lifetime of Tenant for Life.

Bequest of residuary estate to testator's wife for life, and, after her death, of "one fifth of my residuary estate unto each of my two sons *J.* and *C.* absolutely and to be paid and transferred to them respectively or to such of them as shall be living at the time of the decease of my said wife or the children of such of them as may be then dead the children of such as shall be dead taking the part or share only which their parent would have taken if living with benefit of survivorship as between my two sons in the event of either dying without issue in my lifetime."

C. survived the testator, but died a bachelor in the lifetime of the widow. *J.* survived the widow:—

Held, that, upon the death of the widow, *J.* was entitled to two fifths of the residuary estate.

WILLIAM CLARK made his will, dated the 30th of December, 1845, which, after a gift of his residuary personal estate upon trust for his wife for life, contained the following bequest: "And from and after the decease of my said wife I give devise and bequeath one fifth part of all and every my said residuary estate unto each of my two sons *James Clark* and *Charles Clark* absolutely and to be paid and transferred to them respectively or to such of them as shall be living at the time of the decease of my said wife or the children of such of them as may be then dead the children of such as shall be dead taking the part or share only which their parent would have taken if living with benefit of survivorship as between my two sons, in the event of either dying without issue in my lifetime."

The testator died in February, 1849. *Charles Clark* died a bachelor in 1858. The testator's widow died in 1868. *James Clark* survived her.

The trustees of the will being doubtful who was entitled to the one fifth of the testator's residuary estate, to which *Charles Clark* would have been entitled if he had survived the widow, paid that fifth into Court under the *Trustee Relief Act.*

This was a Petition by *James Clark* for a declaration of the rights of parties in the fund in Court, and for payment of the fund to the person or persons entitled thereto.

Mr. *Charles Hall*, for the Petitioner:—

The Petitioner, being the only one of the testator's two sons who survived the widow, is entitled to two fifths of the residuary estate. The testator, though he has used the words "one fifth to each of my two sons," has dealt with the two fifths as an aggregate fund, as appears clearly from the direction that the children of a deceased son shall take only the part or share which their parent would have taken, which was inserted to prevent them and the surviving son from taking *per capita*; then there is a clear gift over, in the event of one of the sons predeceasing the tenant for life, of his share to his children, if any, or if he should have no children, then to the son who should survive the tenant for life. So anxious was the testator to shew that the surviving son should take the whole, that, *ex majori cautelâ*, he has added the clause giving benefit of survivorship in the event of one son dying in his own lifetime.

[The Vice-Chancellor referred to *Sturgess* v. *Pearson* (1).]

The bequest here is in effect precisely the same as in that case, and there, if any one of the children had survived the tenant for life, he would have taken the whole.

Mr. *W. Pearson*, for the personal representative of *Charles Clark*:—

Charles Clark took a vested interest in one fifth, which in the events which have happened, has not been divested. There is not here, as in *Sturgess* v. *Pearson* (1), a gift of an aggregate fund to a class of persons, but two separate gifts of one fifth to *James* and one fifth to *Charles*. These are clear gifts of vested interests, and, in order to divest them, you must find equally clear gifts over. No doubt there is a gift over of the separate share originally given to each son to his children in the event of his predeceasing the tenant for life and leaving children, but the words "or to such of them as shall be living at the time of the decease of my said wife" must be read in connection with the direction for payment immediately preceding and with the substituted gift to the children which follows them. The concluding words of the bequest giving benefit of survivorship as between the sons in the event of either

(1) 4 Madd. 411.

V.-C. M. 1870 *In re* Clark's Trusts.

predeceasing the testator clearly indicate his intention that there should not be such benefit of survivorship in any other event.

Mr. *Renshaw*, for the next of kin of the testator :—

The fact that there are separate gifts of one fifth to each son entirely distinguishes this case from *Sturgess* v. *Pearson* (1), and *Browne* v. *Lord Kenyon* (2). One fifth is given to each of the two sons if he survives the tenant for life, and to his children if he predeceases the tenant for life and has children; but in the event, which has happened, of one son having neither survived the tenant for life nor had children, one fifth is undisposed of.

Mr. *Hall* in reply :—

The words "or to such of them as shall be living," &c. cannot be separated from the words of gift, but the direction to pay and transfer must be read as part of the gift. The distinction between words of gift and directions for payment has been carried quite far enough : *Locke* v. *Lamb* (3) ; *Merry* v. *Hill* (4). As the testator has provided for the children, if any, of a son predeceasing the tenant for life, the principle of *Emperor* v. *Rolfe* (5), and that class of cases in favour of early vesting, does not apply : *In re Wilmott's Trusts* (6).

Sir R. Malins, V.C. :—

It can scarcely be disputed that if the testator had given two fifths of his residuary estate as one entire gift in the manner in which he has given these two one fifths, the case of *Sturgess* v. *Pearson* would have applied, and *James Clark*, the only son who survived the tenant for life, would be entitled to the whole of the two fifths. Instead of this, he has given the two fifths thus :— [His Honour read the bequest, and continued.] The last clause was inserted only to prevent a lapse, and has no application in the events which happened. Now I must say, that in my opinion it is precisely the same thing whether a man says, "I give two fifths to my two sons, to be divided equally between them," or "I give one fifth to each of my two sons ;" he means precisely the same thing, whichever he says, and to construe this bequest

(1) 4 Madd. 411.
(2) 3 Madd. 410.
(3) Law Rep. 4 Eq. 372.
(4) Law Rep. 8 Eq. 619.
(5) 1 Ves. sen. 209.
(6) Law Rep. 7 Eq. 532.

otherwise than as a gift of two fifths to the two sons equally, would, in my opinion, be doing violence to the language. Having given one fifth to each of his sons he proceeds to provide for the event of a son dying in the lifetime of the tenant for life, and accordingly he adds the words "or to such of them as shall be living at the time of the decease of my said wife." What is it that is given to "such of them as shall be living," &c.? If it is one fifth only you must read it thus: "I give one fifth to *James Clark* or to such of them as shall be living, &c., and I give one fifth to *Charles Clark*, or to such of them," &c., but that would make nonsense of it; it is therefore plain that he has inseparably connected the two fifths together, and given the whole to the two sons equally or to such as shall be living at the death of his wife. It is therefore precisely the same case as *Sturgess* v. *Pearson* (1), where the gift was to one for life, and after his death to his three children or such of them as should be living at the time of his death; and it was held that the three children took a vested interest, liable to be divested in favour of those who should be living at the death of the tenant for life, though, in the event which happened, of all of them dying in the lifetime of the tenant for life, the divesting clause did not take effect. The testator's intention is more clearly shewn by the gifts to the children of the part or share which the parent would have taken. The part or share of what? Of the two fifths which were the subject of the bequest.

I am therefore of opinion, not only that it was the general intention of the testator, but that it is the result of the grammatical construction of his language, that each of his sons should take one fifth if both survived the tenant for life; that if one son died before the tenant for life and had children those children should take one fifth; and that if one son died before the tenant for life without children the son who survived the tenant for life should take the two-fifths; in other words, it was a gift to the sons who should survive the tenant for life in themselves or in their children. I must, therefore, declare, that in the events which have happened, *James Clark* is entitled to the fund in Court.

Solicitors: Messrs. *Waller & Scott.*

(1) 4 Madd. 411.

V.-C. M. 1869 Dec. 20.

In re TIMES LIFE ASSURANCE AND GUARANTEE COMPANY.

Company—Winding-up—Tender of Petitioner's Debt and Costs—Right to withdraw Petition.

A creditor who has presented and advertised a Petition to wind up a company is entitled to withdraw the Petition, and if he brings the Petition to a hearing after an offer to pay his debt and costs, he will not be allowed costs incurred after such offer.

Port 646, 12 Eq. 28 60 17 Eq 424

THIS was a Petition for the winding up of the *Times Life Assurance and Guarantee Company.*

The Petitioner was the holder of a policy of assurance granted by the company in 1853 for £100 payable on her attaining the age of sixty years, which age she attained on the 2nd of August, 1869. The Petitioner had duly paid the premiums to the *Times Company* until March, 1857, when the *Times Company* ceased to carry on business, and was amalgamated with, and transferred its business and property to, the *Albert Life Assurance Company*, and from that time she paid the premiums to the *Albert Company* in pursuance of a direction given to her by an agent of the *Times Company.* The *Albert Company* was ordered to be wound up on the 17th of September, 1869.

When the £100 became due, the Petitioner applied for payment first to the *Albert Company*, and then to its provisional liquidator, but it was not paid by either of them.

The Petition was presented on the 1st of December, 1869; on the 2nd of December the Petitioner obtained an order for the appointment of a provisional liquidator, and on the same day the Petition was served, by the direction of the Court, on *H. B. Sheridan*, the former manager of the *Times Company*, and was duly advertised. On the 11th of December the solicitors of the *Times Company* wrote to the Petitioner's solicitors a letter offering to pay her debt and costs, and giving them notice not to incur any further costs in the matter; and on the 13th of December the company's solicitors tendered to the Petitioner's solicitors £100, but they declined to receive it until the Petition came on to be heard.

Butsee Re Assurance Co 11 Ir Ch 174. 1 CB

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On the 14th of December a summons was taken out in the name of *H. B. Sheridan* to stay further proceedings on the Petition upon payment of the Petitioner's debt and costs up to the 13th of December, and to discharge the provisional liquidator on payment of his remuneration, to be ascertained in Chambers. The summons was adjourned into Court, and upon the opposition of the Petitioner's counsel was ordered to stand over till the hearing of the Petition.

Mr. *Glasse*, Q.C., and Mr. *Solomon*, for the Petitioner :—

The Petitioner is willing to withdraw the Petition, or to have it dismissed, upon payment of her debt and costs. After a petition has been once advertised the petitioner has no power to withdraw it, but is bound to let it come to a hearing in order to give creditors and shareholders the opportunity of appearing to support or oppose it: *In re Marlborough Club Company* (1).

Mr. *Cole*, Q.C. (Mr. *Lindley* with him), for the provisional liquidator, asked for his costs.

Mr. *Roxburgh*, Q.C., and Mr. *Higgins*, for the company and for *Sheridan* :—

The Petition must be dismissed, and the Petitioner must pay her own costs incurred subsequently to the tender of her debt and costs. She ought to have applied to the company, or some one on its behalf, for payment of her debt before presenting her Petition. The appointment of a provisional liquidator without the consent of the company was contrary to the practice: *Emmerson's Case* (2), and was quite unnecessary. The provisional liquidator ought not to have appeared, and cannot have any costs of appearing. There is no rule against a petitioner withdrawing his petition upon payment of his debt and costs. After such payment the petitioner can of course obtain no order, and the Court will not make an order at the instance of other persons if the petitioner has no case: *In re Spence's Patent Cement Company* (3). *In re Marlborough Club Company* was not followed in *In re Humber Ironworks Company* (4). In *In re Imperial Guardian Life Assurance Society* (5) the petitioner was ordered to pay all costs incurred after an offer to pay his debt and costs.

(1) Law Rep. 1 Eq. 216. (3) Law Rep. 9 Eq. 9.
(2) Ibid. 2 Eq. 231. (4) Ibid. 2 Eq. 15.
(5) *Post*, p. 447.

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Mr. *Speed*, for creditors who desired to support the Petition.

Mr. *Pearson*, Q.C., for the liquidators of the *Albert Company*.

Mr. *Glasse*, in reply :—

The Petitioner could not by withdrawing her Petition have escaped the liability to pay the costs of persons who, having seen the advertisement, might appear to oppose it. The company should have offered to indemnify her against such costs, as was done in *In re Imperial Guardian Life Assurance Society* (1). The company having ceased to carry on business, there was no one to whom the Petitioner could apply for payment of her debt.

SIR R. MALINS, V.C., after stating the facts, and expressing his regret that, considering the small amount of the debt, the Petitioner had not before presenting a Petition applied to Mr. *Sheridan* to know if he, or some other person connected with the company, would pay her debt, continued :—

If this had been a cause it would have been my duty to have made a person who persisted in incurring costs after an offer had been made to satisfy her claim, and pay her costs up to the time of the offer, pay all the costs subsequently incurred ; but it is said, upon the authority of the decision of Vice-Chancellor *Kindersley* in *In re Marlborough Club Company* (2), that a person who has presented a winding-up petition is not, like a plaintiff in a cause, *dominus litis*, but becomes a kind of public officer, and must go on to a hearing for the benefit of other persons. If such a rule has been laid down I very much regret it; I think it is most desirable, with a view of preventing useless expense and litigation, that a petitioner should be *dominus litis ;* but without saying whether or not that is or ought to be the rule of the Court, I must say that in the case of this very small debt everybody ought to have been anxious to put an end to the litigation, and that the proper course would have been for the Petitioner to stay all further proceedings upon payment of her debt and costs being offered. But she refused to do so, and thereupon Mr. *Sheridan* made an application in Chambers to stay proceedings, which was adjourned into Court.

(1) *Post.* p. 447.

(2) Law Rep. 1 Eq. 216.

That application appeared to me to be very reasonable, but upon the Petitioner's counsel objecting that the Petition could not properly be withdrawn until it came into the paper for hearing, I ordered that it should stand over until the hearing, and I assumed that when the Petition came into the paper the matter would be settled at once; instead of which I have had the Petitioner and the provisional liquidator each appearing by two counsel, and a long argument upon the question of costs. I have no hesitation in saying that no costs incurred after that offer was made by the company's solicitors can be allowed. I do not agree to the proposition that the petitioner in these cases is a trustee for other persons; I think he may withdraw his petition at any time. The Master of the Rolls, in *In re Humber Ironworks Company* (1), has laid down the rule, that when a petition is dismissed no person opposing the petition will have his costs unless a personal charge is made against him, and of course no one supporting the petition can have costs. In this case, an offer having been made to satisfy the whole of the Petitioner's demand, it was impossible that an order could have been made on the Petition, and therefore the Petitioner could not have been liable to any costs. I entirely agree with Vice-Chancellor *James* that it is the duty of the Court to prevent these petitions from being the means of creating unnecessary costs. The company, therefore, will not have to pay the costs of the Petitioner and provisional liquidator incurred after their offer was made on the 13th of December. I shall only allow the Petitioner and the provisional liquidator the costs of appearing by one counsel each, and I shall not allow the provisional liquidator the costs of a brief of the Petition or affidavits. Upon payment of the £100, and an undertaking by the company's solicitors to pay the Petitioner and the provisional liquidator their costs properly incurred up to the 13th of December, including the costs of appearing by one counsel, the Petition must be dismissed.

Solicitors for the Petitioner and Provisional Liquidator: Messrs. *G. & A. Lindo.*

Solicitors for the Respondents: Messrs. *Edwards & Edwards*; Messrs. *Lewis, Munns & Co.*; Messrs. *Sawbridge & Wrentmore.*

(1) Law Rep. 2 Eq. 15.

V.-C. J.

1870

Jan. 19, 20; *Feb.* 12.

PERCEVAL *v.* PERCEVAL.

Old Will—Contingent Remainder—Failure for want of Particular Estate—Residuary Bequest of "Estate and Effects" to Trustees "and their Heirs"—Reversion held to pass.

Testator, by a will dated in 1832, gave and devised all his freehold estates to the use of his daughters (five), whom he named, equally, as tenants in common for their several and respective lives, with remainder to trustees to preserve during the lives of the daughters "respectively," and from and after the decease of either of his said daughters, as to the one-fifth part or share of the daughter so dying, to the use of all and every the children of such daughter, born or to be born, who, being a son or sons, had attained or should attain twenty-one, or, being a daughter or daughters, should attain that age or be married, in equal shares, and to their several heirs and assigns for ever; but if there should be no such child, who being a son should attain the said age, or being a daughter should attain that age or be married as aforesaid, then to the use of the others of his said four daughters for their respective lives, with remainder as to each share to such daughter's child or children.

After making certain specific and pecuniary bequests, the testator, as to "all the rest, residue, and remainder" of his "estate and effects," gave and bequeathed the same to the same trustees, "their heirs," executors, administrators, and assigns, upon trust to lay out and invest the same or the produce thereof, as therein mentioned, as they should think fit, and hold his said residuary estate upon the same trusts as were thereinbefore declared with respect to his real estate, or as near thereto as the rules of law and equity would permit.

Testator died in 1834.

One of the daughters, who married in 1835, died in 1851, leaving an only child, a son, *W.*, who did not attain twenty-one until 1860.

In a suit of *Holmes* v. *Prescott* (1), upon the same will, it had been incidentally held by the Lord Chancellor, when Vice-Chancellor *Wood*, that the limitation of each daughter's share in the freehold estates to her child and children being contingent, the remainder to *W.* failed for want of a particular estate to support it:—

Held, that the limitation over of the same share, if there should be no such child, being also a contingent remainder, also failed, and that the reversion in such share, after the death of the daughter, passed under the residuary clause in the same will, and did not descend to the heir.

SIR *CHARLES FLOWER*, Baronet, by his will dated the 26th of January, 1832, gave and devised all his freehold and copyhold estates, after certain uses which determined or failed of effect, to the use of his (testator's) daughters *Ann Mary*, widow of *Michael*

(1) 12 W. R. 636.

Henry Perceval, *Elizabeth*, widow of *Thomas Wildman Goodwyn*, *Caroline*, widow of *Christopher Magnay*, *Clarissa* and *Jemima*, equally between them as tenants in common, for their several and respective lives; and from and after the determination of the estate limited to or in favour of his said daughters severally and respectively, to the use of four trustees and their heirs during the natural life and lives of his said daughters "respectively," upon trust to preserve contingent remainders; and from and after the decease of each or either of his said daughters, then as to the one-fifth part or share of the daughter so dying, "to the use of all and every the child and children of such daughter born or to be born, who being a son or sons have attained or shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or be married, such marriage being with the consent of their mother if living, in equal shares and proportions, and to their several heirs and assigns for ever; but if there shall be no such child, who being a son shall attain the said age, or being a daughter shall attain that age or be married as aforesaid, then to the use of the others of my said four daughters for their respective lives in equal shares; with remainder as to each share, to such child or children as she has or may have, who have attained or shall attain the like age or be married as aforesaid, and their several heirs and assigns for ever."

Testator directed that his son *James* "and all and every other person or persons who by virtue of the limitations of this my will shall come into possession" of the estate, should have power of leasing.

He directed his executors to enfranchise all such of his lands and premises as were of copyhold tenure.

He then gave and bequeathed a leasehold estate to the same four trustees, their executors, administrators, and assigns, "in trust for such person or persons as from time to time shall be entitled to my said real estates, and to go in the same manner or as near thereto as the rules of law and equity will permit."

After certain specific and pecuniary bequests, the testator bequeathed as follows:—

"And as to all the rest, residue, and remainder of my estate and effects, I give and bequeath the same to" the same four trustees,

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"their heirs, executors, administrators, and assigns, upon trust to lay out and invest the same or the produce thereof in their names, in some or one of the public stocks or funds, or in real or government securities, at interest, with power to alter, vary, and transpose the same from time to time as my said trustees or the trustees or trustee for the time being shall think fit, and to pay the interest and dividends thereof to my son *James Flower* for his natural life, or until he shall become bankrupt or insolvent, as aforesaid, or shall mortgage or assign the same, and then to hold my said residuary estate upon the same trusts as are hereinbefore declared with respect to my real estate, and the rents and profits thereof, or as near thereto as may be, and the rules of law and equity will permit."

In a codicil to his will, dated the 18th of October, 1833, the testator directed and appointed that two sums of cash over which he had a power of appointment by will, should form part of his "residuary personal estate," and he thereby "gave" several pecuniary legacies.

The testator died on the 15th of September, 1834, leaving his son *James* his heir-at-law, and his son *James* and his five above named daughters his next of kin.

Sir *James Flower*, the son, died on the 17th of May, 1850.

Jemima Flower, the youngest daughter, in 1835 married the Rev. *William Holmes*, and died on the 8th of April, 1851, having had one child, *William James Owen Holmes*, who attained twenty-one on the 2nd of September, 1860.

The bill in this suit was filed on the 29th of February, 1868, by *Charles George Perceval*, the eldest son of Mrs. *Perceval*, against the various other persons interested under the above devise to the use of the testator's daughters and their children, and was amended on the 8th of May, and re-amended on the 2nd of June, in the same year.

It stated to the effect that as the Defendant *W. J. O. Holmes* did not attain twenty-one until after the decease of his mother, a question had arisen upon the construction of the will, whether the devise to the use of the children of *Jemima Holmes*, who should attain twenty-one, being supported by no preceding particular estate, did not fail. If it failed, the persons now entitled to Mrs. *Holmes'*

fifth were the persons entitled to the remaining four-fifths as devisees under the will, or some of them; but that the Defendant *W. J. O. Holmes* contended that he took a vested remainder, and that the share belonged absolutely to him.

The bill prayed for inquiries as to what hereditaments remained subject to the uses of the will; as to who were the parties entitled to and interested in the same hereditaments; that the rights and interests of all parties might be declared, and for partition of the estates; or if the title to the fifth share in question should not be ascertained and declared, that the share might be set apart and appropriated for the persons entitled thereto.

Upon the case being opened, it was stated that in January, 1864, decisions had been come to by the Lord Chancellor, then Vice-Chancellor *Wood*, in a case of *Holmes* v. *Prescott* (1), upon the same will, which materially affected the present contention.

The Plaintiff in that suit was the above-named Defendant *W. J. O. Holmes*, claiming to be entitled to, 1, one-fifth of the *corpus* of the residue; 2, one-fifth of the *corpus* of the leaseholds; and 3, the whole of the accumulations of the income of the one-fifth of the leaseholds. Further than was incidentally necessary for the determination of these questions, the point as to the devise above stated was not raised in *Holmes* v. *Prescott*.

The Court held:—1. That the devise of the freeholds to the children of each daughter was a contingent remainder, which (in Mr. *Holmes*' case), owing to the failure of the particular estate, failed; but 2. That the bequest of the personal estate upon the same trusts as had been declared with respect to the real estate did not fail, and that Mr. *Holmes* took one-fifth of the residuary personal estate, of the accumulations, and of the *corpus* of the leaseholds; and 3. That the intermediate rents of the leaseholds fell into the residue.

It was admitted by all parties at the present hearing, that after the decision in *Holmes* v. *Prescott* it was impossible in this Court to contend that the devise to Mr. *Holmes* had not failed; and the only question now remaining for decision was whether the fifth share in the real estates which had failed to take effect in the

(1) 12 W. R. 636; 10 Jur. (N. S.) 507; 33 L. J. (Ch.) 264; 11 L. T. (N. S.) 38; 3 N. R. 559.

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Defendant *Holmes*, passed under one of the other dispositions of the will, or descended to the heir-at-law.

Mr. *Fry*, Q.C., and Mr. *W. Barber*, for the Plaintiff.

The VICE-CHANCELLOR said that upon the question of the failure of the remainder, *Holmes* v. *Prescott*, being a decision on this very will, was an authority by which this Court was bound.

Mr. *Fry*:—Taking, then, the remainder after the death of Mrs. *Holmes* to have been contingent, and to have failed for want of a particular estate to support it, it becomes necessary to consider the second part of the clause, beginning with the words, "but if there shall be no such child who, being a son, shall attain the said age, or being a daughter shall attain that age, or be married as aforesaid."

We contend that the effect of this limitation was to create an alternative gift; if at the death of Mrs. *Holmes* she should have a child or children, who being a son or sons had attained twenty-one, or being a daughter or daughters had attained twenty-one, such child or children were to take; if not, the share was to go over to the other four families. In other words, the contingent expression, "but if there shall be no such child," means, if there shall be no such child at the death of Mrs. *Holmes*.

The VICE-CHANCELLOR:—How can I say that there has been no child of Mrs. *Holmes* who has attained twenty-one?

Mr. *Fry*:—In this sense, that at Mrs. *Holmes*' death there was no child of hers who had attained twenty-one.

This limitation cannot be held to be a remainder, because it is limited after a remainder which exhausts the whole fee. It is an alternative gift, depending on a double contingency.

THE VICE-CHANCELLOR:—

I agree that there is a double contingency, but my view is, that the second limitation was as much a contingent remainder as the first, and that it fails in the same manner and for the same reason.

Mr. *Fry*, and Mr. *W. Barber*:—The result is, that as to this fifth there was an estate in fee simple left in the testator undisposed of, which neither of these devises exhausted.

That estate in fee will pass under the residuary devise in the will, though before the *Wills Act* (1 Vict. c. 26): *Egerton* v. *Massey* (1); *Doe* v. *Scott* (2); *Doe* v. *Fossick* (3); *Dobson* v. *Bowness* (4); *Price* v. *Hall* (5).

Mr. *J. T. Prior*, Mr. *Heath*, Mr. *Coode*, and Mr. *Street*, for various Defendants in the same interest as the Plaintiff.

Mr. *Bovill*, and Mr. *B. B. Rogers*, for incumbrancers.

Sir *Roundell Palmer*, Q.C., Mr. *Joshua Williams*, Q.C., Mr. *Kay*, Q.C., and Mr. *Hitchcock*, for the Defendant *Holmes*:—

We contend that the fifth share in the real estate, which failed to take effect in the Defendant *Holmes*, passed under the residuary clause in the will, and becomes distributable in the same way as the personal estate, in which it has been held that Mr. *Holmes* is entitled to participate.

The terms of this residuary clause imply a trust for conversion as well as a power of sale: *Mower* v. *Orr* (6): *Affleck* v. *James* (7).

Moreover, the undisposed of share would pass under the gift of "all the residue of my estate and effects" to trustees, even without the words "and their heirs," which occur here: *Stokes* v. *Salomons* (8); *D'Almaine* v. *Moseley* (9); *Lloyd* v. *Lloyd* (10).

It cannot be said that the residuary gift fails on the ground that, the testator having (although contingently) disposed of the whole fee, there is no residue to dispose of. Here there was plenty of residuary estate upon which the clause might have operated; for independently of the failure of the contingent remainder, the daughters or some or one of them might have died without children.

The VICE-CHANCELLOR said that the case had resolved itself

(1) 3 C. B. (N. S.) 338.
(2) 3 M. & S. 300.
(3) 1 B. & Ad. 186.
(4) Law Rep. 5 Eq. 404.
(5) Ibid. 399.
(6) 7 Hare, 473, 475.
(7) 17 Sim. 121.
(8) 9 Hare, 75.
(9) 1 Drew. 629.
(10) Law Rep. 7 Eq. 458.

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into this: whether there was an intestacy, or whether the estate passed by the residuary gift.

Mr. *Willcock*, Q.C., and Mr. *Bevir*, for the devisees of the heir of the testator:—

The will is to be read as a matter of intention from end to end, the language being looked at not in its technical sense, but as indicative of intention.

Viewed in this light, we say the residuary clause was intended to deal with personal estate only. When the testator means to deal with real estate, he uses the words "give and devise;" when he gives pecuniary legacies he uses the word "give" only; here he says, "I give and bequeath." The language of the codicil favours the same view, and there is the additional improbability that he meant by a reversionary clause to pass a reversion which could not take effect till the deaths of all who took prior interests.

No doubt, under this residuary clause, leaseholds would pass; but the object was to exclude freeholds and copyholds.

Before the *Wills Act*, every devise, whether residuary or not, was specific, because the will speaks from its date. Here nothing was in the testator but a reversion, to which the language of this devise was quite inapplicable: *Jarman* on Wills (1), referring to *Doe* v. *Underdown* (2).

The VICE-CHANCELLOR:—*Doe* v. *Underdown* appears to be an authority on the other side. The principle of the cases seems to be, that if there be any shadow of a beneficial interest left in the testator, which he had not disposed of, though he may have thought he had disposed of everything, it goes into the residuary clause.

Mr. *Willcock*:—Here he has given the interest contingently.

The VICE-CHANCELLOR:—The question, Is is the whole interest here purported to be given? The residuary gift can only fail by lapse, or under some statute. The reversion cannot be subject to a contingency.

Mr. *Willcock*:—In *Upjohn* v. *Upjohn* (3), the moiety of an estate

(1) 3rd Ed. vol. i. p. 610. (2) Willes, 293.
(3) 7 Beav. 59.

which was devised in one alternative upon one set of trusts, in another alternative upon another, was held, both alternatives failing, to pass to the heir-at-law, and not to the residuary devisee.

So in *Duffield* v. *Duffield* (1), where the testator gave an estate in fee, contingent upon the donee attaining twenty-one, and there was a residuary clause, the Judges held that during the contingencies the estates descended to the heir-at-law.

Before and until the *Wills Act*, specific devises in mortmain which failed went to the heir, not to the residuary devisee. What difference can it make whether the gift fails by operation of law, or in any other way?

In *Rhodes* v. *Whitehead* (2) Vice-Chancellor *Kindersley* followed *Holmes* v. *Prescott* (3).

It is impossible to suppose that the testator knew there was this contingent interest undisposed of, and that he intended to dispose of it in this inconsistent way. All the gifts immediately preceding are of goods and chattels, and but for the word "heirs," which must have slipped in *per incuriam*, the whole would have been confined to personalty. "Heirs" are not the proper class of persons to receive and lay out money.

Mr. *Amphlett*, Q.C., and Mr. *Wolstenholme*, for the trustees of the testator's will, referred to *Woollam* v. *Kenworthy* (4).

Mr. *Gaselee*, for the trustees of the will of the heir.

The VICE-CHANCELLOR called upon

Mr. *Fry*, in reply, only on the case of *Duffield* v. *Duffield* :—

The other report of *Duffield* v. *Duffield* (5) shews that there is some error in the report in *Dow & Clark*. Instead of the words, "as the case sent to us states a residuary clause" (6), it should be, "as the case sent to us states no residuary clause." That makes the whole consistent; and it is certain that when the case was sent back to the Judges with the residuary clause in it they decided (7) that it was "without question that the legal fee simple of

(1) 1 Dow & Cl. 266, 310, 395.
(2) 2 Dr. & Sm. 532.
(3) 12 W. R. 636. 10 Jur. N.S. 507
(4) 9 Ves. 137.
(5) 3 Bli. N. S. 260, 342.
(6) 1 Dow & Cl. 310, 395.
(7) 1 Dow & Cl. 396, 401; 3 Bli. (N. S.) 344.

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the estate, out of which their rents and profits are to arise, was devised, by the residuary clause in the will, to the trustees."

SIR W. M. JAMES, V.C.:—

I have no doubt whatever that the word "estate" must, in this case, have its natural and ordinary meaning.

Here "the residue and remainder" of the testator's "estate and effects" are given and bequeathed to trustees "and their heirs;" and certainly something far more express than is here stated is required to cut down such a gift as that, so as not to include a share, the gift of which has failed by reason of its having been contingent.

The contention would really not have been arguable but for the case of *Duffield* v. *Duffield* (1), which, instead of being, as seemed at first sight, opposed to such a conclusion, in truth supports it.

There will be a partition of the whole estate into fifths; and the lapsed fifth will be sold.

The Plaintiff's costs, and one set of costs for each share, will be allowed up to this hearing; another set for the trustees of the will; another for the trustees of the will of the heir.

The enfranchisement will be continued.

Feb. 12. The case was mentioned again to-day.

The costs of the incumbrancers on the reversions of the shares were directed to be taxed, and added to the respective debts; and as to the incumbrancers on the life estates, the set of costs payable in respect of each share was ordered to be paid first to the incumbrancers in order of their priorities, and then to the owners.

Solicitors for the Plaintiff, and the Defendants in the same interest: Messrs. *Lethbridge & Son.*

Solicitors for Mr. *Holmes:* Messrs. *Field, Roscoe, & Co.*

Solicitors for other Defendants: Mr. *Thomas Browning;* Mr. *Nation*; Mr. *O. Lucas.*

(1) Dow. & Cl. 310; 395.

HABERGHAM *v.* RIDEHALGH.

V.-C. J.
1870
Feb. 9, 21.

Will—Construction—Gift to A. and a Class for their Lives—Gift over on Death of Survivor to the Children of A. and the Class—Children of Members of Class predeceasing Testator not excluded—Children of a Member of Class predeceasing the Date of the Will excluded.

Testator devised real estate to trustees and their heirs, upon trust to permit his brother-in-law, *H. M.*, and all and every his brothers and sisters, to enjoy the rents and profits for their respective own use in equal shares for their lives, with benefit of survivorship where any of them should die without leaving children; but where any of them should die leaving children, upon trust to let such children have their parents' share, until the longest liver of his said brother-in-law, brothers, and sisters should die; and so soon as they should all be dead, upon trust to convey the said shares equally among the children of his said brother-in-law, brothers and sisters, in equal shares by families and not by heads; but if any of them should die without having a child or children, then upon trust to convey the shares of such as should so die unto the survivors in equal shares.

Before the date of the will, one brother of the testator had died, leaving children. After the date of the will, and before the death of the testator, *H.M.* and a brother and a sister had died, leaving children:—

Held, that the children of *H. M.* and of the brother and sister who were living at the date of the will were entitled to shares in the estate; but not the children of the brother who was dead at the date of the will.

JAPHET HABERGHAM, by his will, dated the 15th of August, 1842, gave and devised his (two) shares in two farms and estates of inheritance, called *Lower Making Place*, and *Barrett Hill*, in *Soyland*, in the parish of *Halifax*, *Yorkshire*, to his brothers *John* and *David*, their heirs and assigns, upon the following trust:—

"Upon trust to permit and suffer my brother-in-law, *Henry Mitchell*, and all and every my brothers and sisters, to have and enjoy the annual rents, proceeds, and profits thereof to and for their respective own use, in equal shares, for the several terms of their natural lives, with benefit of survivorship where any of them die without leaving children; but where any of them die leaving children, then upon trust to let such children have their parents' share of such rents, issues, and profits, until the longest liver of my said brother-in-law, brothers, and sisters shall die; and so soon as they shall all be dead, then upon trust to convey my (*sic*) said shares unto and equally among the children of my said

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brother-in-law, brothers, and sisters, in equal shares, by families, and not by heads; but if any of them die without leaving a child or children, then upon trust to convey the shares of such as shall so die unto the survivors in equal shares." Testator appointed his brothers *John* and *David* his executors.

John Habergham, the above-mentioned brother, by his will dated on the same day, gave and devised his (one) share in the same two farms to his brothers *Japhet* and *David* upon identically the same trusts as were expressed in the will of his brother *Japhet*. He appointed his brothers *Japhet* and *David* his executors.

At the date of these wills, *Japhet* and *John* had five brothers—*Nehemiah*, *George*, *Manasses*, *Moses*, and *David*; and two sisters—*Rhoda*, the wife of *Henry Mitchell*, and *Susannah Radcliffe*, widow, living. One brother, *Silvanus*, was already dead in December, 1838, having had seven children, six of whom were living at his death.

On or about the 23rd of January, 1844, *David Habergham* died, having never been married, and having by will of that date given and bequeathed all and every his real and personal estate to and to the use of his brothers *Japhet* and *John*, their heirs, executors, administrators, and assigns, upon trust, after payment of debts, funeral and testamentary expenses, to pay the rents, issues, and profits "unto and equally amongst themselves and all my brothers and sisters, and the children of such of them as are now dead or shall hereafter die (such children to take only their respective parents' share)," as to the trustees should seem expedient, during the lives of testator's brothers, *Japhet*, *John*, *Manasses*, and *Moses*, and the survivors and survivor of them; and from and immediately after the death of the last survivor, upon trust to sell and convert and stand possessed of the clear residue of the proceeds "in trust for all and every my nephews and nieces (children of all my brothers and sisters) who shall be living at the date of the survivor of them my said brothers *Japhet*, *John*, *Manasses*, and *Moses*, share and share alike, to take *per capita* and not *per stirpes*."

In February, 1849, *Henry Mitchell* died; and in April, 1849, *Rhoda* his wife died, having had two children—*Mary Ann*, wife of *James Marsland*, and *Henry Mitchell* the younger, both of whom were living at their mother's death.

In August, 1855, *Nehemiah Habergham* died, having had six children, of whom four were living at his death.

On the 3rd of March, 1856, *Japhet Habergham*, the first above-mentioned testator, died.

On the 2nd of December, 1860, *John Habergham*, the second above-mentioned testator, died. Neither had ever been married.

On the 29th of December, 1863, *Manasses Habergham* died, having had four children, all of whom were living at his death. One died afterwards, aged thirty-five, in 1864.

The bill was filed originally in July, 1866, by *Moses* and *George Habergham*, *Susannah Radcliffe*, and *Richard* and *George* the younger, two sons of the first Plaintiff, *George Habergham*, against the executors of *John Ridehalgh*, a mortgagee, to whom the entirety in the above premises had been conveyed by a deed on the 6th of August, 1849, in trust for sale; praying that the trusts of the deed might be performed and carried into execution by the Court, and that the rights and interests of all parties interested in the proceeds of sale might be declared; that if necessary new trustees might be appointed of the three above-mentioned wills, and for administration, if necessary, of the personal estate of *John Ridehalgh*.

In September, 1867, *Henry Mitchell* the younger died, aged forty-three.

In December, 1867, the Plaintiff *George Habergham* died, having had six children, of whom five were living, one, a daughter, having married, and having died in August or September, 1860.

The bill was re-amended on the 15th of January, 1867.

By a decree dated the 11th of May, 1867, accounts and inquiries were directed; and the questions now, on further consideration, arising upon the construction of *Japhet Habergham's* will, which would, of course, govern that of *John*, were: first, whether or not the children of *Silvanus Habergham*, who was dead at the date of the will, were excluded from a share of the estate; secondly, whether or not the children of *Henry* and *Rhoda Mitchell* and of *Nehemiah Habergham*, who died after the date of the will, but before the testator, were excluded.

Mr. *Kay*, Q.C., and Mr. *Jolliffe*, for the Plaintiffs:—

Our contention is, that the children of *Henry* and *Rhoda Mitchell*,

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and of *Nehemiah Habergham*, all of whom predeceased the testator, are excluded; and, beyond all question, the children of *Silvanus*, who was dead at the date of the will.

The gift to "*Henry Mitchell*, and all and every my brothers and sisters," is a gift to a class; being so, it is determinable at the death of the testator. Consequently, in the subsequent bequest, there is no gift except to children of members of the class, *i.e.*, to children of brothers and sisters living at the testator's death: *Loring* v. *Thomas* (1).

In *In re Hotchkiss' Trusts* (2), your Honour held, upon a gift to children of cousins, that the children of a cousin who had died before the date of the will were not entitled to participate.

Mr. *Everitt*, for Defendants, the three surviving children and widower of the fourth child of the late Plaintiff, *George Habergham* (other than the Plaintiffs *Richard* and *George*), and for the three surviving children of *Manasses Habergham*, deceased, supported the same construction.

It was further contended that the children would take *per capita* and not *per stirpes*: *Dowding* v. *Smith* (3), *Linden* v. *Blackmore* (4), and other cases collected in *Jarman* on Wills (5).

Mr. *E. Leigh Pemberton*, for one of the four surviving children of *Nehemiah Habergham*:—

The children of a brother living at the date of the will are entitled to participate.

The circumstance of the death of a parent in the testator's lifetime does not defeat the interest of the children: *Varley* v. *Winn* (6). Had all the brothers and sisters died in the lifetime of the testator, there could then have been no doubt as to the construction.

Mr. *North*, for the surviving child and representatives of the deceased child of *Henry Mitchell*, four of the children of *Nehemiah*, and the children of *Silvanus Habergham*:—

All the children of *Henry Mitchell*, and all the brothers and sisters, take *per stirpes*.

(1) 1 Dr. & Sm. 497.
(2) Law Rep. 8 Eq. 643.
(3) 3 Beav. 541.
(4) 10 Sim. 626.
(5) 3rd Ed. vol. ii. p. 181, note (m).
(6) 2 K. & J. 700.

As to the children of those brothers and sisters who were dead at the testator's death, *Drakeford* v. *Drakeford* (1) shews that the class is determinable at his death; as to the children of those who have died since, at the death of the tenant for life.

Upon the second point, *In re Potter's Trust* (2) is a clear authority to shew that the children of a brother dead at the date of the will, are not excluded.

Mr. *Amphlett*, Q.C., and Mr. *Wickens*, for the Defendants, the executors.

Mr. *Kay*, in reply:—

In *Drakeford* v. *Drakeford* the Master of the Rolls only meant to say that the amount of the share of the children of a deceased parent must be fixed at the death of the testator; who were to take might not be known till the arrival of the period of distribution.

Clark v. *Phillips* (3) is an authority for the proposition that a gift to *A.*, *B.*, and *C.*, and the children of *D.*, is a gift to a class.

As to *Henry Mitchell*, and those brothers who died in the lifetime, there was no share of which they were ever tenants for life to go to their children; hence the children of those only who were living take, and they take the whole.

Feb. 9. SIR W. M. JAMES, V.C.:—

In this case the testator made a will, the material words of which are as follows:—[His Honour read the clause extracted above, and continued]:—

At the date of the will the testator had several brothers and sisters living. He had one who had died. *Henry Mitchell*, and a brother and sister, who were living at the date of the will, died between that date and the testator's death; and the question is, whether the children of *Henry Mitchell* and of the brothers and sisters so dying are entitled to shares in the rents and profits during the continuance of the life estate.

(1) 33 Beav. 43. (2) Law Rep. 8 Eq. 52, 60.
(3) 17 Jur. 886.

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It was contended by Mr. *Kay* that a gift to *A.* and a class of persons, is also a gift to a class, and that with regard to that class this rule has been laid down: that in order to determine the class you must take the persons who answer the description at the death of the testator. That implies that where there is a gift to a class, that means a gift to such of the class as shall be living at the death of the testator; and it follows that no one member of the class who may have died in the lifetime of the testator will be entitled.

That reasoning is a very good illustration of the process by which in this Court we have established a body of dogma, and developed a whole code of artificial rules, according to which a testator's will is treated as if it were something written in cypher, and incapable of being construed except by those learned persons who have the key of the cypher. Nevertheless, sometimes the Court is enabled to determine questions arising upon wills according to the rules of common sense; either by playing off one rule against another, or by resorting to some general rule of construction which controls the rest.

One of these rules is, that no one is to be deprived of a remainder by reason of the death of the tenant for life before the occurrence of the event upon which the remainder is to take effect.

Another rule is, that the general intent is to prevail against the particular intent; and if the Court can arrive at a general result as to what the testator intended, that general result will prevail over every particular construction.

In this case I must come to the conclusion that the children of *Henry Mitchell* were objects of the testator's bounty; and it would be a departure from that intention to deprive them of that bounty. It seems to me, also, that the other children of the testator's brothers and sisters were also intended to be objects of his bounty; and it would be a violation of his plain general intention to deprive them of that bounty by reason of the death of their parents in his lifetime.

If it had been necessary to find an authority for that general rule, I should have had no difficulty in following what was said by Vice-Chancellor Sir *James L. Knight Bruce*, in *Leach* v. *Leach* (1), namely, that "words in a will are to be construed according to

(1) 2 Y. & C. C. 495, 499.

their ordinary sense and meaning, unless the testator has declared, or by the context shewn, that he uses them otherwise." But I do not think it necessary to rely upon that.

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There will be a declaration in conformity with this view; but I cannot extend this construction to the children of the brother who predeceased the date of the will; because it was utterly impossible the testator could have intended his becoming a tenant for life.

Mr. *Amphlett* asked, as the estate was very small, that the costs of the executors might be paid first out of the estate.

The VICE-CHANCELLOR assented.

Solicitors for the Plaintiffs: Messrs. *Bower & Cotton*, agents for Mr. *Tubb, Halifax.*

Solicitors for the Defendants: Messrs. *Paterson, Snow, & Burney.*

IVES *v.* DODGSON.

V.-C. J. 1870 *Feb.* 21.

Will—Contingent Annuity—Legacy to Annuitant—Codicil—Mis-description of "Legacy" as "Annuity"—Erroneous Words rejected, and Gift upheld.

Testatrix by will gave to *A. B.* an annuity of £40, contingent on a certain event. She then gave *A. B.* a legacy of £30. By a codicil testatrix said, "And I increase the immediate annuity of £30 left by my will to" *A. B.*, "to an annuity of £50":—

Held, that *A. B.* took an annuity of £50 in addition to the contingent annuity of £40.

SPECIAL CASE.

Elizabeth Smith, widow, by her will, dated the 3rd of December, 1868, appointed three executors; and after reciting that she might, under the will of her late father, *John Heaphy*, become entitled absolutely to a moiety of his residuary estate in the event of the failure and determination of certain trusts by the same will declared in favour of her sister *Fanny Heaphy* and her children, testatrix bequeathed the same moiety to the three trustees, their executors, administrators, and assigns, upon trust, in the event of such failure and determination, to get in, receive, and convert the

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same, and hold the trust premises upon trust, amongst other things, "to raise and pay out of the income" of the trust premises, among other annuities, "unto *Jane Maria Ives*, in case she shall have continued to live with, and kindly and faithfully, and to the entire satisfaction of my trustees or trustee, have served and attended upon, my sister, the said *Fanny Heaphy*, until the death of my said sister, but not otherwise; or in case some other attendant instead of the said *Jane Maria Ives* shall have kindly and faithfully, and to the entire satisfaction of my trustees or trustee, attended my said sister for the period of two years immediately previous and up to the death of my said sister, then unto such other attendant the annuity of £40" for life. Testatrix afterwards bequeathed "a legacy, free of duty, unto the said *Jane Maria Ives* in case she shall at my death continue to be the attendant of my said sister *Fanny Heaphy*, of £30, in addition to any moneys which may then be owing to her by me for wages or otherwise."

On the 27th of May, 1869, testatrix made a first codicil to her will; and by a second codicil, dated the 5th of July, 1869, she directed as follows: "And I increase the immediate annuity of £30 left by my will to *Jane Maria Ives* to an annuity of £50, duty free."

Testatrix died on the 11th of July, 1869. Her sister, *Fanny Heaphy*, was, and had been for several years, of unsound mind, so found by inquisition, and *Jane Maria Ives* was now, and was at the death of the testatrix, her attendant.

The case was stated between *Jane Maria Ives* as Plaintiff, and the trustees of the will and the residuary legatees as Defendants; the Plaintiff claiming an immediate annuity of £50 in substitution for the legacy of £30 bequeathed by the will, in addition to the contingent annuity of £40. The Defendants, the residuary legatees, on the other hand, contended that the testatrix intended to increase the legacy of £30 to a legacy of £50, but not to give the Plaintiff an annuity of that amount.

Mr. *Kay*, Q.C., and Mr. *Cookson*, for the Plaintiff:—

The testatrix's intention was to benefit the Plaintiff; she merely prefaces her gift by a mis-recital. The Court will reject the erroneous language, and retain the rest.

In *Jordan* v. *Fortescue* (1) a testator by codicil gave to *A. B.* £500 in addition to £1500 which he had before bequeathed to him. He had before bequeathed two legacies of £500 and £500 only; and it was held that the legatee was entitled by implication to £1000: *Jarman* on Wills (2).

Mr. *Kingdon*, for the trustees.

Mr. *Amphlett*, Q.C., and Mr. *Bardswell*, for the residuary legatees:—

The question, no doubt, is one of intention. We say she intended to increase her bounty by another gift of the same kind. If a testator in a codicil recites that by his will he has made a devise or bequest which does not there appear, the codicil does not, by such recital, create that bequest or devise: *Re Arnold's Estate* (3); *Mackenzie* v. *Bradbury* (4).

The word "annuity" must be read "legacy" to make the recital correct; and for consistency's sake it must be read "legacy" in the substantive gift. If so, the Plaintiff, instead of a legacy of £30, takes a legacy of £50.

In *Smith* v. *Fitzgerald* (5) it is observed by Sir *W. Grant*, M.R., that "without denying that the recital of a gift as antecedently made may amount to a gift, the Court ought to see very clearly that there is nothing in the will to which the recital can refer before it is turned into a distinct bequest; otherwise an inaccurate testator may be held to make a second bequest, when he has only made an incorrect reference to the first.

[They also referred to *Skerratt* v. *Oakley* (6) and *Re Smith* (7).]

SIR W. M. JAMES, V.C.:—

I am of opinion that the Plaintiff's contention must succeed.

The plain meaning of the words of the codicil is to say that the Plaintiff was to have an annuity of £50. For some reason or other the testatrix wished to increase her bounty to her to that amount. The words as they stand would give *Jane Maria Ives* an

(1) 10 Beav. 259.
(2) 3rd Ed. vol. i. 495.
(3) 33 Beav. 163, 171.
(4) 35 Beav. 617, 620.
(5) 3 V. & B. 2, 8.
(6) 7 T. R. 492.
(7) 2 J. & H. 594.

V.-C. J. 1870 IVES v. DODGSON.

annuity of £50; and if so, it is for those who assert that there has been a mistake, to point out what the mistake is, and how it is to be cured.

The mistake lies in the words "immediate annuity of;" but because the testatrix has mis-described a legacy as an annuity, I cannot hold that by "an annuity of £50," she meant "a legacy of £50." If she had said "and I increase the £30 left by will to *Jane Maria Ives* to an annuity of £50," there would have been no difficulty.

I must, therefore, strike out the erroneous words, and read the codicil as it would stand without them.

The result is, that the Plaintiff will take an annuity of £50 in addition to the contingent annuity of £40.

The question will be answered in conformity with this opinion.

Solicitor: Mr. *Henley Grose Smith.*

V.-C. J. 1870 *Jan.* 21, 22, 24.

CROXTON *v.* MAY.

Wife's Equity to a Settlement—Extent of the Right—Husband's Legal Right—Form of Settlement—Ultimate Limitation.

8 Ch 482-3, 10 L.D. 767 12 L.D. 188

The extent of a wife's equity to a settlement is to have a provision made out of the fund for herself and her children by her present or any future marriage; and Courts of Equity will not interfere with the marital right beyond what is necessary to give effect to the wife's equity.

Hence the form of the ultimate limitation in a settlement made by the Court of property subject to a wife's equity is, after the death of the wife, and failure of children of her present or any future marriage, for the benefit of the husband, whether he survives the wife or not.

Observations on *Spirett* v. *Willows* (1) and *In re Suggitt's Trusts* (2).

THE question in this suit was as to the proper form of a settlement by the Court of property subject to a wife's equity to a settlement.

A testatrix, by will, bequeathed a legacy of £1000 to be paid within three months after her death to her niece, at the date of the will a spinster, who married on the 30th of April, 1861. In

(1) Law Rep. 1 Ch. 520; Ibid. 4 Ch. 407. (2) Law Rep. 3 Ch. 215.

12 Jur N.S. 538

I Can and Ft. 9 L.D. 388.

the autumn of 1861, the husband and wife separated, and had since lived apart.

Testatrix died on the 12th of July, 1863; and the executor paid the interest on the legacy to the wife until the 26th of December, 1867, when the husband claimed it.

The question was, whether the fund ought to be settled, after the wife's death, and failure of children of the marriage, for the benefit of the husband, whether he survived the wife or not; or for his benefit only in the event of his surviving.

Mr. *De Gex*, Q.C., and Mr. *Marten*, for the wife, the Plaintiff:—

The established form of settlement, since 1852, has always been that the ultimate limitation is to be for the benefit of the survivor of husband and wife.

Carter v. *Taggart* (1), decided by Lords Justices Lord *Cranworth* and Sir *James Knight Bruce*, in 1852, is still the law of the Court.

Mr. *Kay*, Q.C., Mr. *G. N. Colt*, and Mr. *Shaw*, for the Defendant the husband:—

It is now the practice to limit the fund, after the death of the wife and failure of children, to the husband and his estate absolutely.

The point came before Lord Chancellor *Chelmsford*, in 1866, in *Spirett* v. *Willows* (2), where the principle was laid down, that the Court will interfere no further than is necessary to secure a benefit to the wife and children; and beyond that, will not deprive the husband of the fund. In that case *Carter* v. *Taggart* was cited. The point came again before the Lords Justices in April, 1869, in the same suit of *Spirett* v. *Willows* (3), when, after full consideration, the ultimate limitation was settled to be for the husband's assignee.

The VICE-CHANCELLOR:—In *Carter* v. *Taggart*, Lord Chancellor *Cranworth* seems to have proceeded upon a wrong assumption, namely, that the husband having failed from inability, arising from the interference of the Court, to reduce the fund into possession in his lifetime, it goes to the wife upon her surviving.

(1) 1 D. M. & G. 286. (2) Law Rep. 1 Ch. 520. (3) Law Rep. 4 Ch. 407.

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Mr. *Kay*:—The truth is, the husband comes before the Court and says: "I will not insist upon my legal right. I will allow the fund to be settled on my wife for her life, and on the children; but beyond that it is mine."

The dates of the cases in which *Carter* v. *Taggart* was followed, are as follows: *Bagshaw* v. *Winter*, before Vice-Chancellor Sir *J. Parker*, in April, 1852 (1); *Gent* v. *Harris*, before the Lord Chancellor, then Vice-Chancellor *Wood*, in January, 1853 (2); and *In re Tubb's Estate*, before Vice-Chancellor Sir *R. T. Kindersley*, in February, 1860 (3).

Mr. *F. J. Turner*, for the Defendants the trustees.

Mr. *De Gex*, in reply:—

Carter v. *Taggart* was first decided by Sir *James Parker* (4) in conformity with the then practice, which was to exclude the husband altogether. Lords Justices *Cranworth* and *Knight Bruce* laid down, in 1852, on the appeal, the rule, which has never been since departed from, except under special circumstances.

The equity of the wife is the creation of the Court, and the only question is, how far has the Court gone? There appears to be no more justice in giving what was the wife's property to the husband's representatives, if he does not survive her, than in allowing it to remain her own. The excuse for the rule of English law which gives to a husband his wife's personal property absolutely, although it only gives him a life interest in her real estate, is, that the husband has to maintain her. After his death this excuse, such as it is, ceases to exist, and furnishes no reason for giving her property to his family rather than to the wife herself. Whatever may be the proper form of settlement, this is incontestable, that the capital of the fund must be left in a reversionary position; if so, why must not the Court be supposed to contemplate the ordinary consequences of that state of things? The husband, in fact, is prevented from reducing it into possession. It is, however, unnecessary to discuss the principle, as the balance of authority is clearly in favour of the rule settled by the Appeal Court nearly twenty

(1) 5 De G. & Sm. 466.
(2) 10 Hare, 383.
(3) 8 W. R. 270.
(4) 5 De G. & Sm. 49.

years ago, followed with only one exception ever since, and adopted by the collections of precedents and in the books of practice: *Seton* on Decrees (1); *Daniell's* Chancery Practice (2). Of course a few only of the cases are reported following a rule so generally recognised, but among those reported are, in addition to those cited on the other side, *Watson* v. *Marshall* (3), decided by Lord *Romilly*, M.R., in 1853, and *Ward* v. *Yates* (4), decided by Sir *R. T. Kindersley* in 1860.

In the first case of *Spirett* v. *Willows*, Lord *Chelmsford* does not express any disapprobation of the long-existing practice, or any intention of altering it. He does not, from the terms of his judgment, appear to have been aware that he was departing from the ordinary rule, which, it is submitted, could not be altered except on full consideration, and with an intimated intention to that effect. The second case of *Spirett* v. *Willows* has really nothing to do with the question. The point was not discussed, and the decision was only a modification of Lord *Chelmsford's* order in 1866.

That being so, the last decision bearing on the point is *In re Suggitt's Trusts* (5), which was decided by Lords Justices Lord *Cairns* and Sir *C. Selwyn*, in February, 1868, and in which the ultimate limitation was to the wife if she survived.

SIR W. M. JAMES, V.C.:—

In this case I am of opinion that the proper frame of settlement to be made is that which was adopted in *Spirett* v. *Willows* (6).

The principle of the Court seems to me to have been accurately expressed by Lord *Cairns* in *In re Suggitt's Trusts*, where his Lordship says:—"Then with respect to the form of the settlement, the principle on which the Court acts is to let in the equity of the wife and children, and to that extent to exclude the husband's marital right; but as soon as that equity is satisfied the provisions of the settlement ought to end, and the marital right ought to return."

It is said that in the case of *Carter* v. *Taggart* (7) there was a

(1) Pages 665, 666.
(2) 4th Ed. Page 109.
(3) 17 Beav. 363–5.
(4) 1 Dr. & Sm. 80.
(5) Law Rep. 3 Ch. 215.
(6) Ibid. 1 Ch. 520.
(7) 5 De G. & Sm. 49.

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deliberate opinion of Vice-Chancellor *Parker* which is inconsistent with this. Vice-Chancellor *Parker* proceeded on his knowledge of the existing practice in the Master's office, which was to exclude the husband altogether, and he deliberately affirmed and adopted that practice, going to the extent of absolutely excluding the husband from all right and interest in his own property, which was taken from him for the purpose of making a settlement upon his wife and her children. When that case came before Lord *Cranworth* he recognised that the fund was the husband's property, and laid down a principle which, I think, would have gone further than the decision of the Court in that case—that principle being, that the legal right was to prevail as soon as the provisions made for the wife and children had been satisfied, or had failed. But, as it seems to me, by a little inaccuracy, he considered that the legal right in a fund of this kind would belong to the husband if he survived, and to the wife if she survived, treating the fund as a fund which had been intercepted by the Court, and which the husband had consequently failed to reduce into possession. That seems to me to be hard measure towards the husband, his legal right being a right to have everything belonging to the wife, subject to this, that if it be a *chose in action* he must reduce it into possession during the coverture. That being the husband's right, the Court intercepts it, and Lord *Cranworth* in that case acted upon this view, that that interception by the Court was equivalent to the husband not having reduced it into possession.

I do not follow that line of reasoning, and I think that the principle laid down by Lord *Cranworth* in *Carter* v. *Taggart* (1) ought to have led to the result which Lord *Chelmsford* came to in *Spirett* v. *Willows* (2).

In *Spirett* v. *Willows*, Lord *Chelmsford* considered the case, it seems to me, in accordance with the true principle, that after you have satisfied the interest of the wife and children the fund ought to go back to the husband, whose property it really was.

That case came very recently, in April last, before the Lords Justices *Wood* and *Selwyn*. The point must have been one which attracted their attention. It is true that the case came before them after it had been dealt with by Lord Chancellor *Chelmsford*,

(1) 1 D. M. & G. 286.

(2) Law Rep. 1 Ch. 520.

and they must have considered the point settled by the order of Lord *Chelmsford*. But what they did would certainly have rendered it necessary that they should make some observations upon Lord *Chelmsford's* decision if they had considered it to be inconsistent with the law of the Court, because what they did was, without expressing any disapprobation whatever of Lord *Chelmsford's* order, to enlarge the ultimate interest so as to give a greater and more beneficial interest to the assignee who represented the husband in that case.

Then it is said that *Spirett* v. *Willows* is inconsistent with what was actually done in *In re Suggitt's Trusts*. In *In re Suggitt's Trusts* it does not appear to me that there was any argument or any decision upon the ultimate form of the settlement. It seems to have been considered as the legitimate and logical result of the principle which was laid down by Lord *Cairns*.

In my opinion that is not so. I think that the principle laid down by Lord *Cairns*, which, to my mind, expresses most accurately the principle upon which this Court ought to proceed, is, that you ought not to interfere with the marital right more than is necessary to give effect to the equity of the wife and her children—that is to say, the right of the wife and her children to have a provision out of the fund. The marital right ought not to be interfered with more than is necessary for that purpose. The logical and proper result of that principle is, that the husband is to have the ultimate reversion, subject to the provision for the wife and her children. The equity is not confined to the children of the marriage, but extends to the children of her present or any future marriage. That was, I think, the form in *Spirett* v. *Willows*.

My opinion on these cases is, that if it be considered that there is a conflict of authority between two Judges constituting the Court of Appeal, then I have to act according to my view of what the rules of law and equity are and ought to be, and my view entirely coincides with the view taken by Lord *Chelmsford* in *Spirett* v. *Willows*.

MINUTES.—Declare that the whole fund, subject to costs, ought to be settled upon the wife for life for her separate use, and after her death to such of her children by the present or any future marriage who, being sons, shall attain twenty-one, or,

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being daughters, shall attain twenty-one, or marry, with the usual powers of maintenance, accumulation, and advancement, and in default of such children, for the husband, whether he survives his wife or not.

Bring the whole fund into Court; pay out of it the costs of all parties as between solicitor and client.

Residue of the fund to be invested, and dividends to be paid to the wife on her separate receipt during her life, or till further order; on her death, liberty to apply; and general liberty to apply.

Solicitors for the Plaintiff: Messrs. *Thomas & Hollams.*
Solicitors for the Defendants: Messrs. *Kingsford & Dorman.*

V.-C. J. 1870 *Feb.* 18.

CALDWELL *v.* FELLOWES.

Joint Tenancy in Reversion of Real Estate—Marriage Settlement—Recital and Covenant—Severance of Joint Tenancy.

By a marriage settlement to which the intended husband and wife were parties, after reciting that upon treaty for the marriage it had been agreed that the property, "as well real as personal," to which the intended wife "is entitled, and may be entitled," should be held upon certain trusts, and that it had been "further agreed" that the intended husband should enter into a covenant "for settling the last-mentioned real and personal property for the purposes last aforesaid," the indenture witnessed that the intended husband covenanted with the trustees that "all the estate and effects, both real and personal, of which" the intended wife "is now seised and possessed, or of which she shall hereafter become seised or possessed," should be settled.

At the date of the settlement the intended wife and her two sisters were joint tenants in fee of real estate, in reversion expectant on the death without issue of their brother.

Similar settlements were made on the marriages of the other two sisters. All three sisters and their husbands died in the lifetime of their brother, who died without issue. No settlements were ever made in fulfilment of the covenants:—

Held, that the joint tenancy had been severed by the settlements.

SPECIAL CASE.

Anne Hester Cole, widow, by her will, dated the 21st of December, 1805, devised all her lands and hereditaments in the county of *Norfolk* to her nephew, Sir *William Abdy*, Baronet, and his assigns, for life, without impeachment of waste, and after his decease to the heirs of his body, and for default of such issue she devised the

same unto her three nieces, *Katharine Mary*, *Charlotte Ann*, and *Harriot*, sisters of Sir *W. Abdy*, and their heirs, as joint tenants.

Testatrix died in December, 1805, or early in 1806.

On the 1st of December, 1808, *Charlotte Ann Abdy* married *Charles Andrew Caldwell;* and by a settlement made on the 30th of November, 1808, to which the intended husband and wife were parties, after reciting that *Charlotte Ann Abdy* was entitled to certain sums of stock—some in possession and others in reversion—and that "upon the treaty for the said intended marriage it was agreed" that the same sums of stock "should be transferred into the names of the trustees to be held upon the trusts thereinafter declared," and that the stocks had been, or were intended forthwith to be, transferred into the names of the said trustees; and after reciting that *Charlotte Ann Abdy* "is now entitled, or may become entitled," to one-third of a sum of cash, and that she was also, or might become, entitled under the will of her grandfather to some other property, both real and personal, "and she may also, under some other will or wills, settlement or settlements, or by descent, representation, or by other means, become entitled to some other property, as well real as personal;" and after reciting as follows: "And whereas upon treaty for the said intended marriage it was further agreed that the said sum or sums of money, and other property, as well real as personal, to which the said" intended wife "is entitled, and may be entitled by any of the means last aforesaid, should be at her sole and separate disposal, independently of . . . . her said intended husband, and that in case of her death without a disposition thereof, the same should go to the child or children of the said" intended wife, "as well by her said intended as by any future husband, and in default of such children to her heir or heirs at law, and personal representatives, exclusive of her said intended husband; and it was therefore further agreed that the said" intended husband "should enter into a covenant for settling the last-mentioned real and personal property for the purposes last aforesaid;" the indenture proceeded to declare the trusts of the personalty, and then proceeded as follows:

"And this indenture also witnesseth, that in pursuance of the said recited agreement in this behalf, and in consideration of the said intended marriage, and also in consideration of the settle-

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ment hereinbefore made of the" before-mentioned funds, the intended husband, "for himself, his heirs, executors, and administrators, hereby covenants and agrees with the said" trustees, "their executors, administrators, and assigns, that all the estate and effects whatsoever, both real and personal, of which the said" intended wife "is now seised or possessed, or of which she shall hereafter become seised or possessed, either" under the settlement of her father and mother, her grandfather's will, "or by any other will or settlement, or by descent, representation, or by any other means whatsoever, shall be assured and settled, and that the said" intended husband "will do and execute, or concur in doing and executing, all such acts and deeds whatsoever as the said" trustees or their counsel "shall reasonably advise and require for assuring and settling the same" upon the trusts thereinafter contained; that was to say, in trust for such persons, and for such estates, and in such shares, manner, or form, and for such purposes, as *Charlotte Ann Abdy* at any time during her life, by deed or will, should, notwithstanding coverture, appoint.

On the 9th of November, 1813, *Katharine Mary Abdy* married Captain, afterwards Sir *Thomas Fellowes*, Knight; and by a settlement made on the 8th of November, 1813, to which the intended husband and wife were parties, after reciting that *Katharine Mary Abdy* was entitled to certain sums of stock, some in possession and others in reversion; and that "upon the treaty for the intended marriage it was agreed between the said *Thomas Fellowes* and *Katharine Mary Abdy*," that the same sums of stock "should be transferred into the names of the trustees of the said settlement, to be held upon the trusts thereinafter declared;" and that the stocks had been, or were intended to be, transferred into the names of the said trustees; and after reciting in precisely the same terms as the recital in the first settlement, except that instead of the passage beginning with the words "should be at her sole and separate disposal," the second settlement contained the following passage, "should be settled for her sole and separate use during her life, and afterwards for the benefit of the child or children of the said *Katharine Mary Abdy*, by her said intended husband, and in default of such children to be at her absolute disposal, with a power enabling her, in the event of her marrying again, to dispose

of the whole or any part of the last-mentioned property, in order to make provision for such second marriage, notwithstanding there shall be a child or children of the said intended marriage; and it was therefore further agreed that the said" intended husband "should enter into a covenant" &c., following the words above; the indenture proceeded to declare the trusts of the personalty, and then proceeded as follows:—

"And this indenture further witnesseth" (following precisely the terms of the covenant in the former settlement where cited in inverted commas above); the trusts being for *Katharine Mary Fellowes* for her sole and separate use for life; after her death for the children and grandchildren of the marriage as she should appoint; and in default of appointment for the children of the marriage as therein declared. The settlement also contained a provision for the children of a second marriage.

On the 4th of December, 1817, *Harriot Abdy* married *George Caldwell*, and by a settlement made on the 2nd of December, 1817, to which the intended husband and wife were parties, after reciting that *Harriot Abdy* "is now entitled, or may become entitled," under the marriage settlement of her father and mother to a share in a certain fund—and "is also entitled, or may become entitled," under the will of her grandfather, besides the residue of her portion of a certain fund, to some other property real and personal, and that "she may also by some other will or wills, settlement or settlements, or by descent, representation, or other means, become entitled to some other property, as well real as personal;" and that "upon the treaty for the said intended marriage it was further proposed and agreed that as well" the before-mentioned shares as "the several other moneys, stocks, funds, and securities, and other property to which the said *Harriot Abdy* is entitled or may become entitled as aforesaid," should be settled as thereinafter declared; the deed, after declaring the trusts of the same shares, proceeded as follows:—

"And this indenture further witnesseth, that for the reason aforesaid, and in consequence of the settlement hereinbefore made of the said stocks or funds . . . . the said *George Caldwell*, for himself, his heirs, executors, and administrators, hereby covenants and agrees with the said" trustees, "their executors, administra-

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tors, and assigns, that in case the intended marriage shall take effect, all the estate and effects whatsoever, both real and personal, of which the said *Harriot Abdy* is now seised or possessed, and of which she shall hereafter become seised or possessed," either under the settlement of her father and mother, or under her grandfather's will, "or by any other will or settlement, or by descent, representation, or by any other means whatsoever, shall be assured and settled; and that the said *George Caldwell* will do and execute, or join and concur in doing and executing, all such acts and deeds whatsoever," as the trustees or their counsel should advise or require for assuring and settling the same upon the trusts thereinafter declared; such trusts being for *George Caldwell* for life, then for *Harriot Caldwell*, if she should survive, for life, and after her death, subject to his life interest, in trust for such persons and for such estates, and in such shares, manner, and form, as *Harriot Caldwell* at any time during her life, by deed or will, should, notwithstanding coverture, appoint.

Mr. and Mrs. *Charles A. Caldwell*, Sir *Thomas* and Lady *Fellowes*, and the Rev. *George* and Mrs. *Caldwell*, all died in the lifetime of Sir *William Abdy*, who died on the 15th of April, 1868, without leaving issue.

The question was, whether the joint tenancy in the *Norfolk* hereditaments devised by Mrs. *Cole's* will to her three nieces, was severed by the settlements, or any or either of them.

Of the three nieces, Lady *Fellowes* died on the 18th of October, 1817, Mrs. *Harriot Caldwell* died on the 15th of September, 1830, and Mrs. *Charlotte A. Caldwell*, the survivor, died on the 29th of March, 1858. Her heir-at-law was *Charles Benjamin Caldwell*.

The case was stated between *Charles B. Caldwell* as Plaintiff, and appointees under instruments made in exercise of powers contained in the several settlements, and the respective trustees, as Defendants.

Mr. *Joshua Williams*, Q.C., and Mr. *Macnaghten*, for the Plaintiff:—

The settlements have not severed the joint tenancy. It might have been severed by an actual conveyance, by a contract for sale, or by an agreement for a conveyance not carried out by actual

deed; but it cannot be affected by these general words: "And whereas upon treaty for the said intended marriage it was further agreed that the said sum or sums of money, and other property, as well real as personal, to which the said" intended wife "is entitled and may be entitled by any of the means last aforesaid, should be settled." An actual alienation only can sever a joint tenancy: *Partriche* v. *Powlet* (1).

The covenant that follows in each settlement is the covenant of the husband alone. Even if the recital goes further than the covenant, the operative part is that which is officious, and the recital is ineffectual: *Young* v. *Smith* (2), following *Hammond* v. *Hammond* (3).

The interest of these three ladies at the date of the first settlement was a joint tenancy in fee in real estate expectant on the death and failure of issue of Sir *W. Abdy*. They all died in his lifetime, and consequently never became entitled in possession: *Dering* v. *Kynaston* (4).

This particular interest in real estate is not within either the recital or the covenant.

The very utmost that can be attributed to the wife is a covenant that if a settlement should be made it should contain so and so.

Mr. *Wickens*, for Defendants claiming under Lady *Fellowes*' settlement:—

The covenant is binding on the wife; for the husband covenants that a settlement shall be made, and the wife covenants that the settlement shall contain certain clauses.

If it be a covenant binding on the wife, it is sufficient to sever any joint tenancy, whether in personal or real estate.

The VICE-CHANCELLOR referred to *Otter* v. *Melvill* (5).

Mr. *Wickens*:—This is not even the converse of that case; because here we have the words "may become" and "may be" entitled.

It is not denied on behalf of the Plaintiff that general words may effect a severance; the only question is, what was the agree-

(1) 2 Atk. 54.
(2) 35 Beav. 87, 90.
(3) 19 Beav. 29.
(4) Law Rep. 6 Eq. 210.
(5) 2 De G. & Sm. 257.

(2) Ch. Rep. 180. 11 Jur. N.S. 963

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ment between husband and wife? There has been a question whether general words will affect the separate estate of a wife, because it is said marriage does not alter her *status* in that respect. But here the recital in the second settlement begins with, "Whereas it was agreed between *Thomas Fellowes* and *Katharine Mary Abdy*." The words "further agreed," which occur afterwards, must mean a further agreement between the same parties. If so, this property, which undoubtedly comes within the words "real property, to which" the wife "is or may be entitled," is bound by the wife's covenant. Nor does the Plaintiff go the length of asserting that the Court can, without rectifying the settlement, cut down the extent of the operative words.

[He referred to *Wright* v. *Lord Cadogan* (1).]

Mr. *Charles Hall*, for Defendants claiming under Mrs. *Charlotte Caldwell's* settlement:—

I adopt the former argument.

The case of this settlement cannot be distinguished.

Mr. *Edward R. Cook*, for Defendants claiming under Mrs. *Harriot Caldwell's* settlement:—

In this case, also, the tenancy was severed.

[He referred to *Maclurcan* v. *Lane* (2).]

Mr. *Williams*, in reply:—

It was not the intention of the settlors to include any property except such as the lady then was, or should become, seised or possessed of. It is enough to say, she was not, and never did become, seised or possessed of this property.

It may be conceded that if the property had fallen in during the coverture it would have been bound.

SIR W. M. JAMES, V.C.:—

I think that, upon the whole, the construction of these settlements is against the Plaintiff.

The question is, whether the joint tenancy was severed by the settlements, or any of them.

(1) 2 Eden., 239; S. C. 1 Bro. P. C. 486. (2) 5 Jur. (N.S.) 56; 7 W. R. 135.

In the first settlement there is a recital as follows: "And whereas upon the treaty for the said intended marriage it was agreed"—in the second settlement it is carried a little further: "And whereas upon the treaty for the said intended marriage it was agreed between the said *Thomas Fellowes* and *Katharine Mary Abdy*," but both are substantially the same—that certain stocks should be transferred, and so forth; and then both settlements proceed thus: "And whereas upon treaty for the said intended marriage it was further agreed that the said sum or sums of money, and other property, as well real as personal, to which the said" intended wife "is entitled and may be entitled, should be" settled.

Now at that time each lady was, beyond all question, entitled to this property in reversion expectant on the death without issue of Sir *W. Abdy*. This property, therefore, falls within the literal meaning of the words "is entitled." Is there anything else to say that we are not in this instance to take the literal meaning of the words? The mere fact that she recites certain specific funds, but does not recite this particular property, is not sufficient to indicate an intention that any property which she did not happen to think of, or which was unknown to her, should not be included in the settlement.

Then the words "And it was therefore further agreed that the said" intended husband "should enter into a covenant for settling the last-mentioned real and personal property for the purposes last aforesaid," followed by the covenant of the husband, sufficiently indicate the intention of the parties. It never could have been intended that he should bind himself, excluding his marital right, to do and execute all acts and deeds whatsoever as should be reasonably required for assuring and settling "all the estate and effects whatsoever, both real and personal, of which the said" intended wife "is now seised or possessed," unless it was the intention and agreement of all parties that the whole of that property should be so settled.

If that be so, if upon taking the whole instrument together, it appears to have been part of the agreement and intention of all parties that the whole of the property should be settled, *cadit quæstio*.

I am of opinion that that is the meaning of the words; and I cannot at all believe it was the intention of the parties to omit, or

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that they had the smallest reason for omitting, any portion of the property to which these ladies were or would be entitled.

I answer the question by declaring that the joint tenancy was severed.

As to *Partriche* v. *Powlet* (1), before Lord *Hardwicke*, it is quite clear that if the Court in that case had considered there was enough in the settlement to enable the persons who set up a claim to take as purchasers, there would have been a severance.

The costs will come out of the three estates equally.

Solicitors for the Plaintiff and some of the Defendants: Messrs. *Cookson, Wainewright, & Co.*

Solicitor for the other Defendants: Mr. *John Vincent.*

V.-C. J. 1870 *Jan.* 17, 18.

TURNER *v.* RINGWOOD HIGHWAY BOARD.

Highway—Obstruction—General Inclosure Act (41 *Geo.* 3, *c.* 109)—*User*—*Lapse of Time.*

In 1811 a public road was set out across *L.* common by the *R.* Inclosure Commissioners of a width of fifty feet, and allotments of the land on either side of the road were at the same time made. About twenty-five feet only of the fifty feet allotted by the Commissioners had been used as the actual road; the sides which were left uninclosed having become covered with furze and heath, and fir trees had been allowed during the last twenty-five years to come up through the furze. In 1868 the Highway Board commenced cutting down, and advertised a sale of some of these fir trees growing within the fifty feet allotted by the Commissioners in 1811 for the public highway.

On bill by the owner of the adjoining land to restrain such cutting:—

Held, that the right of the public was to have the whole width of the road, and not merely that part which had been used as the *via trita*, preserved free from obstructions; and that such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years.

Semble, that the Highway Board were only entitled to remove the trees which were an obstruction to the road, and not as against the owner of the soil to sell the timber of the trees when cut.

THIS was a suit for the purpose of restraining the Highway Board for the district of *Ringwood* from cutting or felling any fir or other trees, or any furze on the Plaintiff's land on each side of the public road through *Leybrook Common*, in the *New Forest.*

(1) 2 Atk. 54.

The Plaintiff had purchased from Lord *Malmesbury*, in 1866, the *Westover* estate, which was intersected for about a mile by the road in question, which was laid out by the Inclosure Commissioners in 1811, under the authority of the *General Inclosure Act*, 41 Geo. 3, c. 109. The land on each side of the road was unenclosed, and immediately adjoining it were fir trees, which had grown up from seedlings, and, though not originally planted for ornamental trees, were alleged by the Plaintiff to have acquired that character, and to have been kept up and cultivated for that purpose by the Plaintiff and his predecessors in title. The property in these fir trees was claimed by the Plaintiff, and the present suit arose out of a notice by the *Ringwood* Highway Board advertising the sale of "600 fir trees growing on the side of the road through *Leybrook Common*, in the parish of *Ringwood*, together with the heath and furze thereon."

The Plaintiff's case was, that the road had been laid down and used of a width of twenty-five feet only, and that from and before 1811 the Plaintiff and his predecessors in title had been in quiet and uninterrupted possession and enjoyment of the land adjoining the twenty-five feet on either side by planting trees thereon, pasturing cattle, cutting the furze and lopping and trimming the trees, and applying the loppings and trimmings to their own use; that there had been no interference or claim until the acts of the Defendants complained of; and it was charged that all right or authority (if any) of the Defendants or their predecessors in office beyond the breadth of twenty-five feet of road ought to be considered as having been waived, or abandoned, or extinguished, long previously to the acts of the Defendants complained of by the bill.

With respect to the fir trees, the Plaintiff stated by his bill that he was advised that the property in them was vested in him as freeholder of the land through which the road passed, and that he and his predecessors in title had always exercised rights of ownership over the same without molestation.

The case of the Defendants, the Highway Board, was, that under the *Highway Act* (5 & 6 Will. 4, c. 50), and as representing the public, they had authority to remove all trees or other obstructions growing within the space of fifty feet, which was awarded in 1811 by the Commissioners under the *Ringwood Inclosure Act*,

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as the width of the road over *Leybrook Common*. The lands adjoining the fifty feet road were allotted by the Commissioners to Viscount *Fitzharris*, then lord of the manor, and to Lord *Malmesbury*, and it was directed that the allotments should be fenced and the fences kept in good repair, but this condition had not been complied with. It was admitted that only a portion of the fifty feet had been actually used as a roadway, and the residue on either side had become covered with heath and furze. With respect to the fir trees, it was stated, and evidence was given to that effect, that some twenty-five years ago the cattle, which had formerly been in the habit of eating down the tops of the firs as they appeared above the furze bushes, were kept from this part of the common, so that the trees had been allowed to grow up. The Defendants insisted that the property in the fir trees growing within the fifty feet allotted for the road, was not vested in the Plaintiff either as freeholder of the land through which the road passed or otherwise, and that any cutting or thinning by the Plaintiff or his predecessors within the fifty feet was done without the knowledge or privity of the Defendants. As to the heath or furze within the fifty feet, it had not been cut by the Defendants, and they had no intention of doing so.

Mr. *Morgan*, Q.C., and Mr. *Sandys*, for the Plaintiff:—

The surveyor is not justified under sect. 69 of the *Highway Act* (5 & 6 Will. 4, c. 50) in cutting down trees on unenclosed land within fifteen feet of the centre of the road, but not forming part of the road as actually used: *Evans* v. *Oakley* (1); and a surveyor who has cut a hedge and removed the obstruction to a highway (5 & 6 Will. 4, c. 50, ss. 64, 65) under an order upon the owner, which was bad for not specifying more particularly in what manner the owner was to cut the hedge, has been held liable in trespass: *Brook* v. *Jenney* (2). The Plaintiff, as owner of the soil over which the highway passed, is entitled to all trees upon it and profits therefrom, subject only to the right of passage over it for the king and his people: *Goodtitle* v. *Alker* (3), citing *Rolle's* Abr. (4); "*Generallment le owner del soile d'ambideux sides le Chimin auera*

(1) 1 C. & K. 125.
(2) 2 Q. B. 265.
(3) 1 Burr. 133.
(4) Page 392, letter B. 5.

les arbers crescent sur le Chimin." In this case, whatever may have been the rights of the public to the whole fifty feet set out for the road in 1811, those rights have been waived and are extinguished by non-user, and are now limited to the *via trita* as actually used.

Mr. *Kay*, Q.C., and Mr. *Freeling*, for the Defendants, the Highway Board:—

The public are entitled to the whole space of fifty feet originally awarded by the Commissioners for this highway, and their right is not limited to that part which has been actually used as the *via trita*, and as such kept in repair: *Rex.* v. *Wright* (1); *Reg.* v. *United Kingdom Electric Telegraph Company* (2). Where there has been a public highway, no length of time during which it may not have been used will prevent the public from resuming the right if they think fit: *Rex* v. *Inhabitants of St. James's Taunton* (3); *Vooght* v. *Winch* (4); *Weld* v. *Hornby* (5). Planting trees on the sides of a road set out by the Commissioners within a certain distance is prohibited by the *General Inclosure Act* (41 Geo. 3, c. 109), s. 9; but the trees in question were not planted by the Plaintiff or his predecessors, and the owner of the adjoining soil can acquire no right as against the public highway by that which is a merely natural obstruction. In any case there is no allegation that the Plaintiff or his predecessors in title are entitled to the soil of the highway, as against the lord of the manor. A gift of the herbage arising on the road to the proprietors of the lands adjoining on each side, by the terms of the *General Inclosure Act*, s. 11, does not vest the soil itself in such proprietors: *Rex* v. *Inhabitants of Hatfield* (6). "And if one grant the herbage or vesture of the wood, hereby is granted the grass and underwood only, and not the timber of great trees:" *Sheppard's* Touchstone (7). We submit that the Defendants were justified in removing the trees which were an obstruction to the high road, and that the Plaintiff is not entitled to relief.

Mr. *Morgan*, in reply.

(1) 3 B. & Ad. 681.
(2) 31 L. J. (M.C.) 166.
(3) Selw. N. P. 1264 (13th edit.).
(4) 2 B. & A. 662.
(5) 7 East, 195.
(6) 4 A. & E. 156.
(7) Page 97.

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SIR W. M. JAMES, V.C.:—

In this case the Defendants are a highway board, and as such have the care of the highway over *Leybrook Common*, which, as set out by the Inclosure Commissioners in 1811, was to be of a width of fifty feet. About twenty-five feet only have become the *via trita* by usage, but the whole fifty feet had been assigned by the Commissioners, in pursuance of their authority, as the public highway. During the last twenty-five years trees have been suffered to grow within the limit of fifty feet, and have been suffered to attain a considerable size. The Defendants have proceeded to cut down some of these trees, and the bill was filed to restrain them from so doing. *Primâ facie*, it would be difficult to say that anyone had the right to prevent the proper guardians of the highway from cutting down any trees which were a permanent obstruction to the use by the public of any part of the highway. The right of the public is to have the whole width of the road preserved free from obstructions, and is not confined to that part which was used as the *via trita*. The Plaintiff's case is, in effect, that he purchased in 1866 the land on each side of and intersected by the road. *Primâ facie*, that would mean the road as allotted by the Commissioners. But then he goes on to say that the road was limited to the twenty-five feet actually used by the public, and, after mentioning certain acts of ownership by himself and his predecessors in title, he insists that the right of the public to anything beyond the twenty-five feet must be considered as abandoned and extinguished. Assuming that the Plaintiff had whatever rights Lord *Malmesbury*, either as lord of the manor or as owner of the adjoining property, had, many of the acts of ownership which were relied on by the Plaintiff were those to which owners of land adjoining a highway were entitled under the *Inclosure Act*. By merely allowing these trees, which never made their appearance until twenty-five or twenty-six years ago, to grow undisturbed until 1868, it could not be held that the rights of the public over the whole width of the road had become extinguished. Whatever were the rights of the public over this ground in 1811, those were the rights of the public in 1868, when the acts complained of by the bill were done, and the public has a right to deal with these trees as it had to deal with the telegraph posts, in the case of *Reg.* v. *United King-*

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dom Electric Telegraph Company (1), *viz.*, on the ground that their existence on this particular spot is a nuisance. The Plaintiff, therefore, had no right whatever to file this bill to restrain the removal of these trees, which were an obstruction upon the highway. Moreover, the Plaintiff has not made out to the satisfaction of the Court that he was owner by any lawful title of the soil on which the trees in question were growing. If the bill had included the property in the trees after they had been cut, this part of the case might have caused me to consider it more. But being clearly of opinion that the Plaintiff has failed upon the case alleged by his bill, and that the right of the public to the whole fifty feet of the road remains unaffected, the bill must be dismissed with costs, but without prejudice to the right of action (if any) which the Plaintiff may have in respect of the removal for the purposes of sale of the trees in question.

Solicitors: Messrs. *Sandys & Knott*, agents for *H. Tremenheere Johns, Ringwood;* Messrs. *Vizard, Crowder, & Co.*, agents for *Davy & Davy, Ringwood.*

WILKINSON *v.* SCHNEIDER.

V.-C. J. 1870 Jan. 27.

Feme Covert—General Power of Appointment by Will—Appointment of Fund to Legatees—Residuary Gift of Personalty—Wills Act, 7 *Will.* 4 *&* 1 *Vict. c.* 26, *s.* 27—*Lapse of Part of the Legacy—Destination of the lapsed Portion —Affidavit of no Settlement by the Wife alone.*

Under a marriage settlement, personalty, the property of the wife, was assigned to trustees upon trust for the separate use of the wife for life, then for the husband for life, and in default, which happened, of children of the marriage, if the husband should survive the wife, which also happened, as to one-third of the *corpus* for the husband absolutely, and as to two-thirds, as the wife should, notwithstanding coverture, appoint, and in default of appointment for the persons who would at the death of the survivor be the next of kin of the wife. Afterwards a decree for a divorce *à mensâ et thoro* was pronounced, and the husband, by deed, for valuable consideration from the wife, assigned to the trustees of the settlement all his share and interest whatsoever, whether in his marital right or otherwise, in the property comprised in the settlement upon trust, as the wife should by deed or will appoint, and

(1) 31 L. J. (M.C.), 166.

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after her death, in default of appointment, for her next of kin as if she had died without a husband.

The wife, by will, in exercise of her power, appointed the fund to two of the three trustees of the settlement, and directed that they (whom she appointed executors), should stand possessed of the same upon trust to sell, and out of the proceeds stand possessed of a sum of £1000, and also of her residue, after the decease of a tenant for life, upon trust for her two nieces in equal shares absolutely.

She also appointed, gave, and bequeathed "all my plate, linen, books, pictures, jewels, household furniture, and stores, all of which are my separate property, or have arisen from my separate savings, together with any other separate property and savings which I may have at my death," to a legatee absolutely.

One of the nieces died in her lifetime:—

Held, that the share of the funds which lapsed did not pass by the residuary clause under the 27th section of the *Wills Act*:

Held, further, that the share of the funds which lapsed passed to the next of kin of the testatrix, and not to the persons interested in default of appointment under the settlements.

Testatrix, by will, bequeathed certain chattels to her niece, *Maria Dyer*, then unmarried, absolutely. *Maria Dyer* married a husband named *Wilkinson*, and the testatrix, by a codicil, revoked the bequest contained in her will, and made another disposition of the same property in favour of her two nieces. The second niece died, and the testatrix made another codicil, in which she expressed a wish that "in the event of the name of *Maria Wilkinson* having been erased from my will, it be reinstated as previously there placed":—

Held, that the codicil was inoperative.

Where a husband is residing permanently abroad *Semble*, the Court will act upon an affidavit of no settlement by the wife alone.

FURTHER CONSIDERATION.

By the settlement, dated the 23rd of February, 1847, executed shortly before the marriage of *Charles Le Blanc* and *Maria Stacy*, various items of personal property belonging to the intended wife were assigned to *William Frederick Schneider*, *John Thomas Ord*, and *Benjamin Gray*, upon trust after the solemnization of the marriage, for the wife for her separate use for life, then for the husband for life, and after the decease of the survivor for the children of the marriage. It was declared that if there should be no child of the marriage, and if the husband should survive the wife, the trustees should invest so much of the trust moneys as would produce £100 a-year for the benefit of certain persons named, and stand possessed of the residue, as to one-third for the husband absolutely, and as to the other two-thirds, upon and for

such trusts and purposes as the wife should by will, notwithstanding coverture, appoint; and in default of appointment "in trust for the person or persons who under or by virtue of the statutes made for the distribution of the estates of intestates would be, at the decease of the survivor of them, the said *Charles Le Blanc* and *Maria Stacy*, or such failure of their issue as aforesaid, whichever shall last happen, entitled thereto, in case the said *Maria Stacy*, having survived the said *Charles Le Blanc*, were then to die possessed thereof and intestate, and be divided in the shares and proportions in which the same would be divisible by virtue of the same statutes."

In the month of July, 1851, a decree for a divorce *à mensâ et thoro* was pronounced between *Charles* and *Maria Le Blanc*, and by a deed of arrangement dated the 6th of August, 1852, after reciting, amongst other things, that the trustee, *J. J. Ord*, was desirous of retiring, and that by certain indentures therein mentioned, *Abraham Hely Hutchinson Lattey* had been appointed a trustee in his place, and that the trust funds had been duly vested in *W. F. Schneider*, *A. H. H. Lattey*, and *B. Gray;* also that *Charles Le Blanc* had agreed with *Maria* his wife for the sale to her, for the sum of £1000, to be paid by her out of moneys to which she was entitled for her separate use, of "all and singular the interest, dividends, and annual produce, part or share, parts or shares, and interest whatsoever to which he the said *Charles Le Blanc* is or may be or become entitled, whether for his life or absolutely, under or by virtue of" the marriage settlement .... "or in his marital right, or howsoever otherwise, of or in the property comprised in or subject to the trusts of" the said indenture, it was witnessed that in consideration of the sum of £1000 to *Charles Le Blanc* paid by *Maria* his wife out of the moneys to which she was entitled for her separate use, *Charles Le Blanc* assigned to *W. F. Schneider*, *A. H. H. Lattey*, and *B. Gray* "all and singular" (&c., following the words above); and it was declared that the trustees should stand possessed of the premises so assigned upon such trusts and for such intents and purposes as *Maria Le Blanc* should, notwithstanding coverture, by deed or will appoint; and in default of appointment upon trust for the separate use of *Maria Le Blanc* for life, independently of her present or any future husband, and after

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her decease for "the persons or person who under or by virtue of the statutes made for the distribution of the estates of intestates would at her decease be entitled to her personal estate in case she had died possessed of the same intestate, and without leaving a husband surviving," to be divided in the shares and proportions in which the same would be divisible under the statutes.

Maria Le Blanc, by her will, dated the 25th of August, 1852, and made in execution of her powers, directed and appointed that all and singular the trust funds comprised in and then subject to the trusts of the indenture of settlement and deed of arrangement respectively, should be retained by, or be paid, assigned, transferred, or otherwise made over unto *W. F. Schneider* and *B. Gray*, upon trust that they, or other the trustees or trustee for the time being of that her will, should, as soon as conveniently might be after her decease, sell the same, and out of the proceeds set apart a sum of £1000, and invest the same, and pay the dividends to *Priscilla*, wife of *William Dyer*, for her life, for her separate use, without power of anticipation, and after her decease to *William Dyer* during his life, and after the decease of the survivor of them should stand possessed of the sum of £1000, and the securities in which the same should be invested, in trust for *Sarah Dyer* and *Maria Dyer*, the two children of *William* and *Priscilla Dyer*, in equal shares as tenants in common, such shares in the said trust moneys and income to belong to and be paid to them respectively for their respective sole and separate use. Testatrix also directed and appointed, that after the payment of certain legacies and annuities the trustees should stand possessed of the rest and residue of the trust fund in trust for *Sarah* and *Maria Dyer*, their executors, administrators, and assigns, in equal shares as tenants in common, such shares in the said residue and income to belong to and be paid to them respectively for their respective sole and separate use.

Testatrix then proceeded as follows:

"And as to all my plate, linen, books, pictures, jewels, household furniture, and housekeeping stores, all of which are my separate property, or have arisen from my separate savings, together with any other separate property and savings which I may have at my death, I, in exercise of all powers in anywise enabling

me in that behalf, do hereby appoint, and also give and bequeath the same unto my niece the said *Maria Dyer*, her executors, administrators, and assigns, for her sole and separate use absolutely, free from the control of any husband with whom she may intermarry, and of his debts and engagements, and to be assigned, paid, or made over to her, or to such person or persons as she shall appoint, for the purpose last aforesaid accordingly."

Testatrix appointed *W. F. Schneider* and *B. Gray* her executors.

In the year 1859 *Maria Dyer* married *Charles Jenkin Jeremie Wilkinson*.

In the year 1861 *Maria Le Blanc*, the testatrix, made a codicil to her will.

On the 28th of February, 1865, *Sarah Dyer* married *William Butler*.

On the 16th of December, 1865, the testatrix made a second codicil, whereby she revoked the bequest contained in her will or testamentary appointment of her plate, linen, books, pictures, jewels, wearing apparel, household furniture, and housekeeping stores, forming part of her separate property; and she appointed and gave the said plate, linen, books, pictures, household furniture, and housekeeping stores to *William Butler*, and her said jewels and wearing apparel to her nieces, *Maria Wilkinson* and *Sarah Butler*, equally.

On the same 16th of December, 1865, the testatrix made a third codicil.

Sarah Butler died on the 25th of October, 1866.

On the 25th of June, 1867, testatrix made a fourth codicil as follows:—"My wish is, that in the event of the name of *Maria Wilkinson* having been erased from my will, it be reinstated as previously there placed."

Testatrix died on the 6th of July, 1867. Her niece, Mrs. *Wilkinson*, was the only person who, under the *Statute of Distributions*, would at her decease have been entitled to her personal estate, in case she had died possessed of the same intestate, and without a husband surviving.

This bill was filed on the 7th of December, 1867, by Mrs. *Wilkinson*, by her next friend, against the three trustees of the deeds and her husband, praying that the trusts of the two above-mentioned deeds might be carried into execution under the decree

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of the Court, and for administration, if and so far as necessary, of the estate of *Maria Le Blanc*.

Inasmuch as the executors of *Maria Le Blanc* were two only out of the three trustees of the settlement, a summons for the administration of the estate of *Maria Le Blanc* was also taken out, and came on with the further consideration of the cause.

The questions were, first, whether the moieties bequeathed to *Sarah Dyer* (afterwards *Butler*) in the sum of £1000, and in the residue, which lapsed as appointments or gifts under the testatrix's will, passed under the residuary clause in the same will; and, if not, whether they passed under the limitations in default of appointment in the settlements of 1847 and 1852, or whether they went to Mrs. *Le Blanc's* next of kin; and, thirdly, whether the fourth codicil had the effect of restoring to the Plaintiff the benefits taken away from her by the second.

As against the next of kin of *Maria Le Blanc*, *Charles Le Blanc*, the husband, made no claim; and the Court considered that he had so far precluded himself by the deed of 1852 from so doing, that he was not a necessary party to the suit, had this objection (which was not raised) been taken.

Mr. *Eddis*, Q.C., and Mr. *Sturges*, for the Plaintiff:—

The testatrix exercised her powers of appointment and disposition over the whole fund. Consequently she made it her own, according to the established doctrine of *Chamberlain* v. *Hutchinson* (1); *Sugden* on Powers (2); *Brickenden* v. *Williams* (3). The portion, therefore, of the fund so appointed which lapsed passes to the Plaintiff as the testatrix's next of kin.

Easum v. *Appleford* (4) was distinguished by your Honour in *Brickenden* v. *Williams* (5); and in *Hoare* v. *Osborne* (6), if that be referred to by the other side, it will be found that there was a complete and perfectly good appointment of the whole fund to trustees; it was part of the beneficial interest only which failed; and it was held that that part went as if it had been unappointed.

If an opposite construction be come to, the fund must be retained

(1) 22 Beav. 444.
(2) 8th Ed. p. 467, pl. 35.
(3) Law Rep. 7 Eq. 310.
(4) 5 My. & Cr. 56.
(5) Law Rep. 7 Eq. 315.
(6) 33 L. J. (Ch.) 586; 10 Jur. (N. S.) 694; 12 W. R. 661; 10 L. T. (N. S.) 258.

until it can be ascertained who the next of kin of *Maria Le Blanc* will be at the death of *Charles Le Blanc*.

As to the second point, the intention to restore the chattels to the Plaintiff by the fourth codicil is obvious.

As to the third point, if the gifts which lapsed pass in no other way, they are appointed and bequeathed to the Plaintiff by the final clause in the will. That clause comprises two classes of property: chattels purchased with savings, which the testatrix afterwards disposes of by codicil, and the residue of her separate property and savings. The gift of "any other separate property and savings which I may have at my death" is a "bequest of personal property described in a general manner" within the meaning of the 27th section of the *Wills Act* (1 Vict. c. 26). The gift cannot be treated as a gift of property *ejusdem generis*, because the word "savings" applies to something quite different from what has been particularized before. The property moreover is to be "assigned" and "paid" as well as "made over;" and the testatrix, "in exercise of all powers" enabling her in that behalf, "appoints" as well as "gives it:" *Bush* v. *Cowan* (1).

The VICE-CHANCELLOR called upon counsel for the Defendants, the trustees of the settlement, to represent the persons who would be *Maria Le Blanc's* next of kin at *Charles Le Blanc's* death.

Mr. *Lindley* and Mr. *S. Dickinson*, for the trustees.

The VICE-CHANCELLOR:—I do not think there is anything in the last contention, and upon that I will not trouble you.

Mr. *Lindley*:—As to the second point, the name of *Maria Wilkinson* was not, in fact, erased from the will, consequently the fourth codicil is inoperative.

Upon the remaining point; the circumstances which occurred in *Chamberlain* v. *Hutchinson* (2) and *Brickenden* v. *Williams* (3) as shewing that the testatrix had an intention of converting the fund over which she had a power of appointment into her own property, are wanting here. So far from confusing the two funds, she takes pains to keep them distinct.

(1) 2 Beav. 228. (2) 22 Beav. 444.
(3) Law Rep. 7 Eq. 310.

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Beyond her savings, the testatrix had no separate estate; she had nothing that she could dispose of by will; she had only powers of appointment. In exercising those powers her purpose was to benefit her two nieces; she had no intention of converting the appointable funds into her general personal estate.

Nor can it be said that this passed under the clause whereby she purports to deal with the savings of her separate estate.

The VICE-CHANCELLOR:—I adhere to my opinion that these funds would not pass under that residuary bequest.

Mr. *Lindley*:—*Easum* v. *Appleford* (1) and *Hoare* v. *Osborne* (2) are authorities in our favour. It is impossible to draw a distinction between a gift to *A.* and a gift to somebody in trust for *A.*

Mr. *Fry*, Q.C., for the Defendant *Wilkinson*.

SIR W. M. JAMES, V.C.:—

I am of opinion that in this case I ought not to keep the property waiting for the decision of this point which has been suggested, until the death of the husband.

I do not think it is really a question of intention at all. It is a question of resulting trust, if anything. There is an absolute severance of the property. The property is appointed to *B.* and *C.*, and taken away entirely from the settlement fund so far as the appointor can do so. Then *B.* and *C.* are trustees. Where is there any equity as between the persons entitled under the settlement and *B.* and *C.*? *B.* and *C.*, no doubt, cannot keep it for themselves.

I think a resulting trust must be a resulting trust always for the creator of the settlement—the conveyer and disponer of the property. The resulting trust here must be for the persons who would be entitled if this were the appointor's property. She appointed two of the settlement trustees executors and trustees of her will; and, as far as she could, made the property, over which she had the power of appointment under the settlement, her own property.

There will be a declaration to that effect.

(1) 5 My. & Cr. 56.

(2) 33 L. J. (Ch.) 586.

10 Jur. N.S. 694

As to the fourth codicil, it seems to me to be inoperative. It only applied to an event which appears never to have occurred. The words are, "in the event of the name of *Maria Wilkinson* having been erased." I can only say the name of *Maria Wilkinson* is not erased, and that is all. She is not speaking of a thing being erased so as to say it is a misdescription. It is only "in the event" of its being erased.

All the parties will have their costs, charges, and expenses.

Mr. *Lindley*:—The fund goes to the Plaintiff as next of kin of the testatrix; it is not to her separate use; consequently it belongs to her husband; but he consents to his wife having everything, if your Honour thinks proper to pay her, on her separate receipt. The only difficulty is as to the affidavit of no settlement.

The VICE-CHANCELLOR:—I must keep the fund separate until the affidavit of no settlement.

Mr. *Sturges*:—In *Elliott* v. *Remmington* (1), where there was property in *Africa*, and the husband was abroad, the Court acted upon the affidavit of the wife.

In this case the Plaintiff's husband is residing permanently abroad in the service of a steam-packet company, mainly in *China*.

The VICE-CHANCELLOR, after consulting with the Registrar (Mr. *Teesdale*):—The Registrar seems to think the wife's affidavit will do. Let the wife's affidavit be tendered, and the matter can be looked into in the Registrars' office.

Solicitor for the Plaintiff: Mr. *James Barry*.
Solicitor for the Defendants: Mr. *D. Aston*.

(1) 9 Sim. 502.

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1870
Jan. 31;
March 5.

SALTER *v.* METROPOLITAN DISTRICT RAILWAY COMPANY.

Lands Clauses Act, 1845, s. 92—*House or other Building or Manufactory—Nursery Garden.*

A man, with his dwelling-house in a piece of ground $2\frac{1}{8}$ acres in extent and surrounded by brick walls, used a part of the land as a nursery garden for trade purposes:—

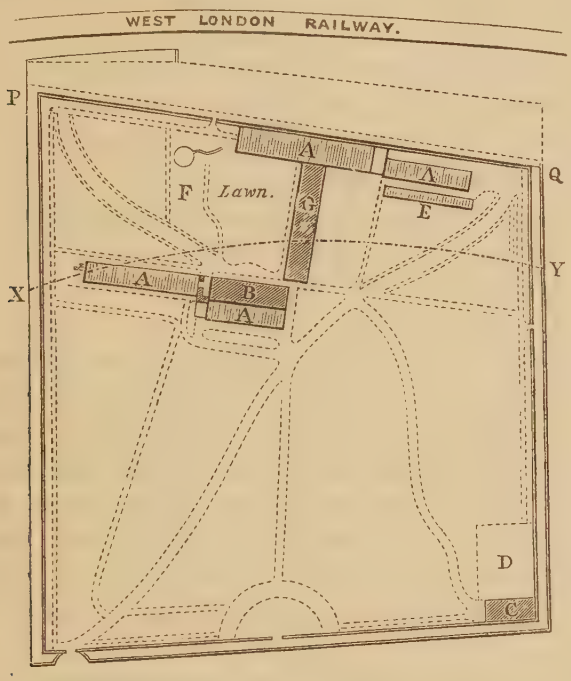
Held, that he was entitled, under s. 92 of the *Lands Clauses Act*, 1845, to compel a railway company, proposing, without actually touching the house, to take the greenhouses and a part which has been planted and used for ornamental purposes, to take the whole of the land.

THIS was a case under s. 92 of the *Lands Clauses Act*, 1845, and came before the Court upon motion for an injunction to restrain the Defendants, the *Metropolitan District Railway Company*, from taking possession of any part of the Plaintiff's premises until they should have paid or properly secured the purchase-money or compensation payable in respect of the whole; and also to restrain them from taking any proceedings, in pursuance of their notice, to ascertain the purchase-money or compensation payable in respect of part only of such premises.

The Plaintiff was the owner of the *Versailles Nursery* at *Hammersmith*, where he resided, and he was described in the bill as "chrysanthemum and fruit-grower, nurseryman, and florist." The *Versailles Nursery* contained 2A. 21P., enclosed within brick walls, abutting on the north-east on the premises of the *West London Railway Company*. The land was occupied on the north-east side by four greenhouses and a fernery, and also by a warehouse for pots and gardening implements, with servants' rooms on the upper story. Adjoining this warehouse was the Plaintiff's dwelling-house, with a greenhouse attached. In front of the dwelling-house were a lawn and kitchen garden, with asparagus beds and forcing pits. The rest of the ground not occupied by buildings was used as a nursery garden, and laid out in paths and beds, and at different parts of the ground ornamental trees and fruit trees were growing.

The disposition of the premises will be best understood by the

plan, the portion required by the railway company being included between the lines P—Q. and X—Y.



A, A, A, A. Greenhouses.
B. Residence.
C. Stable.
D. Yard.
E. Forcing pit.
F. Fernery surrounded by ornamental trees.
G. Store-rooms with bedroom over.

According to the allegations of the bill, the greenhouses and open ground were alike necessary to the Plaintiff's business, and the work of one was auxiliary to that of the other.

In September, 1868, the Plaintiff was served by the Defendants with a notice to treat for the portion of his premises above mentioned. The Plaintiff, in reply, stated that the land comprised by the Defendants' notice to treat was a part only of his house or buildings within the meaning of s. 92 of the *Lands Clauses Act*, and required them to take the whole, claiming in respect of his interest in the property and erections thereon, for the value of his stock-in-trade as a nurseryman and fruit-grower, and for his interruption of business by removal, the sum of £8600. An attempt at

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negotiation having failed, the Defendants, on the 20th of December, 1869, served notice of their intention to summon a jury to assess the amount of purchase-money and compensation payable by them. Under these circumstances the bill was filed, by which the Plaintiff insisted that the premises "constitute and are a house, building, or manufactory within the intent and meaning of the *Lands Clauses Act*, 1845, and that he is not bound to sell and convey part only thereof; in fact, each part of the said premises is essential to the rest, and it will be utterly impossible for the Plaintiff to continue to reside in and enjoy his dwelling-house, or to carry on his business of a nurseryman, if the Defendants are allowed to take only a portion of the said premises."

The Plaintiff's affidavit, after stating that the property was valuable only as an entirety, and giving details of the mode in which the ground was laid out, stated that the whole of the produce of the kitchen garden, and the strawberries, raspberries, gooseberries, and currants, and part of the produce of the fruit trees, were used for the consumption of Plaintiff and his family, and similarly that the flowers were grown, not only for sale, but for enjoyment, and as adjuncts to the dwelling-house, and also for exhibition.

According to the evidence of a surveyor employed by the Defendants, what was termed the dwelling-house was merely a small cottage building, with very few rooms, and those small and low, and surrounded on all sides by greenhouses and land used for the purposes of Plaintiff's business. This surveyor, whose visit was made in December, did not observe any ornamental trees, shrubs, or plants upon the ground, which, according to his evidence, was not planted with any idea of design or ornamentation, but merely with fruit trees, forming part of the stock-in-trade of Plaintiff's business, while the kitchen garden part was devoid of vegetables.

The Plaintiff, in reply, dwelt upon the ornamental and home-like character of his property, quite irrespective of the use of certain parts for nursery purposes, and the profit derived therefrom. His dwelling-house was described as not large, but as being "a pretty, picturesque, and commodious building," neatly built, and elegantly decorated. The lawn had not been dug up for twenty-two years, nor had any tree, plant, or flower growing on it during

that period ever been sold. The fernery, with ornamental ruins, had been made to improve the view from the windows of the house, and for purposes of pleasure and enjoyment, not profit. Of the fruit and vegetables only the peaches, apricots, and nectarines, and a few plums as samples, had ever been sold, while the ornamental trees, many of which were of very rare and valuable species, grown from seeds presented to him by the *Royal Horticultural Society*, and planted with taste and judgment, had never been sold, and were not grown for sale.

Mr. *Kay*, Q.C., and Mr. *Kekewich*, for the Plaintiff, in support of the motion:—

We do not put our case so high as to say that if a railway company takes part of a nursery ground they must take the whole; but where, as here, a man has his house in the middle of a garden, the fact that he carries on the business of a nursery gardener to a small extent, and in a manner subordinate to the residential purposes of his house, does not the less make that garden, the greater part of which is used for the residential enjoyment of the house, a necessary adjunct and part of the house within the meaning of sect. 92. In this case the company have given notice to take part of a building which is part of the house, and also the greenhouses and pleasure ground, which are necessary for the convenient occupation of the house. They must therefore take the whole house, which will include the remaining portion of the ground: *Marson* v. *London, Chatham, and Dover Railway Company* (1); *Steele* v. *Midland Railway Company* (2).

Mr. *Bristowe*, Q.C., and Mr. *H. Fellows*, for the company:—

In order to bring his case within sect. 92, the Plaintiff must shew either that the land proposed to be taken is part of a house, so as to pass under a conveyance of "all that my house at *Fulham*," or that it is a manufactory. In either point of view his case has failed. If he rests it on being part of his house, then, applying the test put by Lord Justice *Turner* in *Steele* v. *Midland Railway Company* (3), this nursery garden is not necessary for the convenient occupation of the house, would not pass under a convey-

(1) Law Rep. 6 Eq. 101.
(2) Law Rep. 1 Ch. 275.
(3) Law Rep. 1 Ch. 289.

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ance of the house, and therefore is not part of the house, and cannot be claimed as an adjunct to it, especially having regard to the relative sizes of the house and garden, and the use, upon his own shewing, of a large portion of the ground for trade purposes. If he claims it as a trade or manufactory, he has not shewn that it is so. There is no case in which the Court has held that where land is held by a person partly in the occupation of a house, and partly for trade or manufacturing purposes, a railway company must take the whole. The Plaintiff must elect on which alternative he rests his case. By his bill and the claim for compensation he has claimed the property as used for trade purposes, but now at the bar he raises the case that the land is appurtenant to the house. We submit that no case is shewn for an injunction; but if the Court interferes, it can only be upon the footing of it being land occupied for the purpose of, and being parcel of, the house.

SIR W. M. JAMES, V.C.:—

In this case, although there is a little ambiguity in the mode in which the claim is put alternatively, either as the business of a nursery gardener or as a dwelling-house, now that the facts are before the Court it appears that the Plaintiff has a residence more or less ornamental, and more or less large, with which residence are connected several things, all within four brick walls, inclosing $2\frac{1}{8}$ acres of land, a large portion of which, upon the evidence now before me, is clearly ornamental ground, and convenient to the house itself. Although in one portion of the bill it is put rather more upon the fact of its being part of his business, the allegation in a subsequent paragraph is: "It will be utterly impossible for the Plaintiff to reside in and enjoy his said dwelling-house, or to carry on his said business of a nurseryman, if the Defendants are allowed to take only a portion of the said premises." True it is that upon a portion of that $2\frac{1}{8}$ acres of ground inclosed within four brick walls the Plaintiff carries on the business of a fruit-grower, a florist, and especially of a grower of chrysanthemums, which he alleges to be a very profitable business. Still it is his dwelling-house, and I know of no law in this country which says that a man who carries on the business of a chrysanthemum and fruit-grower, nurseryman, and florist, is not entitled to have an

ornamental dwelling-house if he likes to have it; that he is not entitled to have lawns, and an ornamental fernery with artificial ruins or ornamental trees upon the ground or about his place, or that it places him in a different position with respect to that property from that in which the law places any other person. I am clearly of opinion that some part of the ground which is taken is part of the ornamental ground attached to the house as a residence. For instance, there is the fernery; there is the building in which the bedroom is; it is clearly part of the house itself in the narrowest view that has been put upon it; and that part being taken, it seems impossible for the company to say they will not take the greenhouses, which in themselves were not part or parcel of the adjuncts of the house, but were part and parcel of the trade. It is impossible to say that there is any of the part not proposed to be taken that does not belong to the house as a residence. They have given notice to take the greenhouse, and that part which is, strictly speaking, the trade part of the property, and that they want for their own purpose; and as they want part of the dwelling-house they must take the whole. It is impossible to draw any line so as to say which was the part dedicated to the house and which was dedicated to the trade. The Plaintiff therefore is entitled to an injunction until the hearing to restrain the company from taking anything else than the whole included within the four walls, as asked by the notice of motion.

Mar. 5. The case was brought on as a short cause, and the Defendants submitted to a perpetual injunction.

Solicitors: Messrs. *Walters & Gush;* Messrs. *Burchell.*

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DYERS' COMPANY *v.* KING.

Light and Air—Obstruction—Clearances by Adjoining Owners.

The easement of a Plaintiff to have his light and air unobstructed by the Defendant's newly-erected buildings is not lost or diminished by the circumstance that, by means of clearances effected in the neighbourhood by other parties shortly before the Defendant's alterations, the Plaintiff acquired more light than the Defendant's buildings could subtract.

MOTION for decree.

The Plaintiffs, the *Wardens and Commonalty of the Mystery of Dyers of the City of London,* were at the commencement of this suit, and had been for more than 150 years previously, owners in fee of a piece of land in the City of *London,* bounded on the east by *Dowgate Hill* and on the south by *College Street.*

Prior to 1839 *Dyers' Hall* stood on part of this plot of land. In 1839 *Dyers' Hall* was taken down, and a new building was erected on part of the site, and opened as a hall and offices in October, 1840. The new building was set back so as to leave an area in front of it from 4 ft. 9 in. to 5 ft. 6 in. wide.

On the south side of *College Street,* and opposite the western portion of the Plaintiffs' buildings, was a house 33 ft. 4 in. high, the property of the *Innholders' Company. College Street* here was 14 ft. 3 in. wide. On the east of the buildings of the *Innholders' Company,* and opposite the middle portion of the Plaintiffs' buildings, there stood for twenty years prior to February, 1869, a building 35 ft. 4 in. in height, belonging to the *Merchant Taylors' Company.* On the east of the last-mentioned building, and extending to the south-west corner of the intersection of *College Street* and *Dowgate Hill,* there stood, prior to February, 1869, another building twenty-three feet in height, also belonging to the *Merchant Taylors' Company.*

In February, 1869, the Defendant *John King,* to whom the *Merchant Taylors' Company* had agreed to let the two last-mentioned buildings on lease, began to pull down the same, and had at the date of the commencement of this suit laid foundations for the erection of warehouses on their site to the height of seventy-four feet from the level of *College Street.*

The bill was filed on the 25th of June, 1869, by the *Dyers' Company*, against *King*, praying that the Defendant might be restrained from erecting any building on the land so leased to him, so as to darken, hinder, or obstruct the free access of light and air to the windows of the Plaintiffs' building, as such access was enjoyed by the Plaintiffs and their predecessors in title and other the occupiers of said building previously to the taking down by the Defendant of the houses or buildings which formerly stood on the ground so leased to the Defendant.

An injunction was moved for and granted on the 15th of July, 1869.

The Defendant moved to dissolve the injunction, but the Vice-Chancellor, on the 3rd of August, 1869, made no order on the motion, except that the costs be reserved to the hearing.

On the 25th of September, 1869, the Defendant filed his answer, wherein he stated that in 1856 the Plaintiffs pulled down a building which stood on the east of *Dyers' Hall*, between that and *Dowgate Hill*, and in consideration of a large sum paid to them by the Corporation of the City of *London*, they set back the new building 5 ft. 8 in. to the north, so as to be in a line with the front of new *Dyers' Hall*.

He further said that the *Merchant Taylors' Company*, his intended lessors, in 1860 sold to the *South Eastern Railway Company* a piece of land at the south-west corner of the intersection of the two streets; and that they also afterwards sold to *John Kemp Welch* another adjoining piece of land, south of the last, and bounded on the east by *Dowgate Hill*, which *Welch* resold to the *South Eastern Railway Company*, and that both those pieces of land had since been thrown into the public way of *Dowgate Hill*, whereby the width of *Dowgate Hill* south of the intersection had been increased from twenty-two feet to forty feet.

Defendant also said, that with the consent of the *Merchant Taylors' Company*, his intended lessors, he had agreed to give up seven feet more of ground on the south side of *College Street*, next *Dowgate Hill*, and that by these means the junction of *College Street* and *Dowgate Hill* had been brought twenty-five feet nearer the eastern end of *Dyers' Hall* than it was before; the opening of *College Street* at west of the intersection had been increased from

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thirteen feet to thirty feet; and the opening of *Dowgate Hill* on the south of the intersection had been increased from forty feet to forty-seven feet.

Defendant said (par. 10), "I believe that in consequence of the alterations hereinbefore mentioned the Plaintiffs have since the year 1856 had and enjoyed a larger quantity of light and air coming to *Dyers' Hall*, and the rooms therein, than they enjoyed in the year 1840, or at any period prior to 1856."

He also said that such access of light and air to *Dyers' Hall* as was enjoyed by the Plaintiffs was derived to some extent from the passage of light and air over the buildings of the *Merchant Taylors' Company;* yet he believed such access of light and air was, and still was, mainly derived from the passage of light and air over the buildings belonging to the *Innholders' Company.*

Mr. *Kay*, Q.C., and Mr. *Chester*, for the Plaintiffs:—

We simply claim the easement we always had.

The Defendant does not say the diminution of our light in consequence of his buildings is too small to be complained of; his defence is, that, not by any bounty of his, but from another source, we have got more light than we had before, and therefore have no right to complain of his proceedings. But that does not prevent our restraining his stopping of our lights.

We are entitled to light of the same nature and aspect that we had before: *Staight* v. *Burn* (1).

Mr. *Bristowe*, Q.C., and Mr. *Freeling*, for the Defendant:—

Theirs is the dominant and ours is the servient tenement. How can it be said that our tenement injures theirs, when it is shewn that they are not injured at all?

The VICE-CHANCELLOR:—I cannot assume that the Plaintiffs have too much light. I must treat it as if they had bought their light from you and paid for it.

Mr. *Bristowe*:—If the Plaintiffs now have the same amount of light, taking all sources together, as they had before, though not from precisely the same sources, they cannot complain. The only

(1) Law Rep. 5 Ch. 163.

right of easement which the Plaintiffs have is a right to a certain definite fixed quantity of light. If an extraordinary amount of light is claimed for a particular purpose, twenty years' enjoyment of such an amount of light must be proved: *Lanfranchi* v. *Mackenzie* (1).

All that *Staight* v. *Burn* (2) decides is that the Plaintiffs are entitled to as much light of the same nature—*i. e.*, coming from the same aspect, whether south or north—as they had before.

The way in which Lord *Cranworth* put it in *Clarke* v. *Clark* (3) was: "The question is, whether the light is so obstructed as to cause material inconvenience to the occupiers of the house in the ordinary occupations of life."

SIR W. M. JAMES, V.C.:—

It appears to me that there is no fact substantially in dispute between these parties. The case resolves itself into a question of law; because, as I understand the case as put by counsel at the bar, and upon all the evidence, it is this: that, assuming the Plaintiffs, in the month of May, 1869, when this thing was begun, to have had up to that time and for twenty years previously the light which they enjoyed at that time, the building which the Defendants are about to erect would be a very material and serious obstruction to and interference with that light. Assuming them to have made out their legal right to the quantity of light which they enjoyed up to and at the time of the filing of the bill, the substantial question which arises on the defence, and which is the only point I have to consider, is this:—They say, "True it is that we are now going, this year, very materially to diminish your light as you enjoyed it last year; but your right to light—the right to which you are entitled for the use of your house—is a right which must have existed for twenty years. Your right is a right to that amount of light which you had twenty years ago; and no matter from what quarter that light came, you had a right to light over all your neighbours' houses; but only to that amount of light which you could shew to have been enjoyed by you for twenty years before the bill was filed; and you have no right to

(1) Law Rep. 4 Eq. 421. (2) Law Rep. 5 Ch. 163.
(3) Law Rep. 1 Ch. 16, 20. 11 Jur. N.S. 915, 6

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complain if, taking into consideration all that we are going to do, and all that everybody has done in the interval, you will still in the result have as much light as you had when you started twenty years ago." I find myself utterly unable to accede to that statement of the legal principle so suggested. The right is a right as between the owner of the dominant tenement and the owner of every servient tenement; he has a right to as much light to and for the use of his house over his neighbour's land as he enjoyed twenty years ago; and the neighbour has no right to deprive him of the light which has so come to and for the use of the house over the neighbour's land, because the owner of the dominant tenement has, either by purchase from, or by the free gift of, any other person, or by the operation of any Act of Parliament, obtained other light in addition to that which he had a prescriptive right to.

Of course, in one aspect of the case, it might be very material to take into consideration the light which he had so acquired; because, if the light which he had so acquired in addition to the prescriptive right was so much in excess of anything he required for the reasonably comfortable enjoyment of the premises as he enjoyed them, you might say, "What is the use of your complaining? You have plenty of light, and what I am going to do will not interfere with you, because when it is done you will have as much light as any reasonable being can ask for, unless he wanted to interfere with his neighbours capriciously and vexatiously."

That is not the case here. It is conceded that there was no great access of light in the street. I suppose that, even in 1869, or in the beginning of this year, the people living in *Dyers' Hall* would have been very glad to have had more light than they had at that time. That being so, that view of the case does not arise; and I certainly cannot think that the owner of this house, any more than the owner of any other house there, can say, "You are going to be interfered with by my erection, but then there is compensation for you; there is an equivalent given you here by somebody else." That is not in my mind a just view of the case.

The legal principle failing, it is not necessary for me to go into the evidence as to whether there is in truth the compensation. If

it were necessary to go into it, it would require considerable argument to satisfy me that, in point of fact, the compensation is given, having regard to the nature of the case. I do not go into it at all. I think the case fails in point of law upon the defence with regard to the equivalent, and that the Plaintiffs therefore are entitled to the decree as asked; of course with the costs of the suit, which will include the costs of the Defendant's motion to dissolve.

Solicitors for the Plaintiffs: Messrs. *Batt & Son.*
Solicitors for the Defendant: Messrs. *Heather & Co.*

In re BURRELL.
BURRELL *v.* SMITH.

Administration—Legal and Equitable Assets—3 & 4 Will. 4, c. 104—Equity of Redemption in Copyholds—Insufficient Estate—Costs of Plaintiff as between Solicitor and Client.

In the case of a testator who died before the 1st of January, 1870, the equity of redemption in copyholds is to be administered as legal assets under 3 & 4 Will. 4, c. 104.

Costs of a plaintiff, a residuary legatee, in a suit for administering an insufficient estate, which he had commenced in Chambers, allowed as between solicitor and client.

THOMAS HOUGHTON BURRELL, who died in August, 1863, by his will dated the 9th of April, 1853, and a codicil dated the 2nd of December, 1858, appointed *Henry Smith* and his (testator's) sister, *Louisa Burrell*, his executors, and devised to them all real estate vested in him as trustee or mortgagee, subject to the equities affecting the same, and all the rest, residue, and remainder of his real and personal estate, to them, their heirs and assigns, upon trust to sell his real and leasehold estates, and to invest the proceeds and hold the same upon trust in certain shares for the persons therein named.

The testator did not charge any part of his property with, or devise any part of it subject to payment of, his debts.

As the whole of the real and personal estate had been devised in trust for sale, an administration suit was, in December, 1863,

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originated by way of summons, by *George Burrell,* one of the residuary legatees, against the executors, and by an order on the 21st of December, 1863, accounts and inquiries were directed; and it was ordered that the real and personal estates should be sold.

Under this order, by an agreement dated the 7th of August, 1865, certain premises situate in *High Street* and *Conduit Street, Chelmsford,* consisting of a copyhold house and shop, and a small freehold house in rear of the same, of which a small portion was copyhold, were contracted to be sold to *William Durrant Burrell* for £900.

The contract was confirmed, and by an order dated the 22nd of March, 1867, *W. D. Burrell* was to be at liberty to pay into Court to the credit of the matter of *Burrell's* estate the sum of £259 16*s.*, being the balance of the £900, after deducting £640 4*s.* which he had paid in discharge of two mortgage debts to which the property was subject.

From the Chief Clerk's certificate, dated the 18th of November, 1869, it appeared that the debts of the testator were as follows:—specialty debts, £1939 2*s.* 3*d.*; simple contract debts, £5940 18*s.*; total, £7880 0*s.* 3*d.* The specialty debts bound the testator's heirs.

The personalty consisted of £807 11*s.* 8*d.* stock, and £30 14*s.* 2*d.* cash in Court; so much of the £1551 12*s.* 5*d.* standing in Court as resulted from the sale of leaseholds; and a balance of £46 15*s.* due from the executors.

The matter and cause had come on for further consideration, at the request of the Defendants as representing the simple contract creditors, upon adjourned summons; a question having arisen whether so much of the sum of £259 16*s.*, representing the equity of redemption of the premises at *Chelmsford,* as represented the copyhold portion of them, was legal or equitable assets (1).

Mr. *Cozens-Hardy,* for the Plaintiff:—

The testator has not charged his real estate with debts; nor devised it subject to the payment of his debts; hence the 3 & 4 Will. 4, c. 104 (2), by which real estate was first made assets,

(1) By the 32 & 33 Vict. c. 46, in the administration of the estate of any person who has died on or since the 1st of January, 1870, all debts are treated as standing in equal degree.

(2) The language of the statute is as follows:—

"When any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments,

applies to this property. But the statute expressly provides that the priorities of specialty creditors shall be saved, thus making real estate of all kinds, whether freehold or copyhold, legal assets. That this is the result of the statute appears from a decision of Lord *Cranworth*, in *Foster* v. *Handley*, which, from the report (1), appears to have been a case of freehold estate; whereas from another report (2), his Lordship seems to have referred to copyholds (3).

The whole of the property has been considered, therefore, as distributable amongst the specialty creditors first, who will probably exhaust the whole.

Mr. *F. H. Colt*, for a specialty creditor, supported the same view:—

Debts on specialty not binding the heirs have no such priority against legal estate as specialty debts in which the heirs are bound: *Cummins* v. *Cummins* (4).

[He also cited *Cook* v. *Gregson* (5).]

Mr. *Boyle*, for the Defendants, was called upon to support the contention of the simple contract creditors:—

Before the statute, only personal estate was assets for the payment of simple contract creditors. The specialty creditor, where

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corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts; the same shall be assets to be administered in courts of equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees, of any person or persons who died seised of freehold estates, was or were before the passing of this Act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by courts of equity under and by virtue of this Act, all creditors by specialty in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract, or by specialty in which the heirs are not bound, shall be paid any part of their demands."

(1) 1 Sim. (N.S.) 200.

(2) 15 Jur. 73.

(3) The record in *Foster* v. *Handley* has been examined, and from that it appears that the estates in question in that case were freehold only.

(4) 3 J. & Lat. 64.

(5) 3 Drew. 547. 2 Jur N.S. 510

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the heir was bound, had at Common Law a right to sue the heir-at-law, and to recover to the extent of the land descended. He had also the right before the statute 3 & 4 Will. 4, c. 104, to have the real estate descended administered as assets in this Court for payment of specialty debts, and like rights were afterwards given against devisees. He could not sue the heir or devisee of copyhold estate, even though the security expressly bound heirs. Nor could copyhold estate descended be administered in equity before the statute 3 & 4 Will. 4 as assets for the payment of specialty debts. In other words, copyhold estate was not assets at law or in equity for the benefit of an ordinary specialty creditor.

Then came the statute which makes both freeholds and copyholds as well as personalty assets for all debts, and unquestionably in the enacting part of the statute they are made equitable assets. The only difficulty is as to the proviso; but as to that, I say it gives no assistance to my adversaries here. They are, indeed, creditors on specialty in which the testator's heirs are bound, but only his common law heirs; the testator's customary heirs are not bound. Consequently they can have no priority over simple contract creditors *quoad* copyholds.

All that the framers of the statute intended, was to give to creditors by specialty in which the heirs were bound priority in respect of lands descendible to the heirs so bound; and as copyhold heirs never were bound by any specialty, the proviso does not extend to copyholds. In the case before Lord *Cranworth* the point did not arise, as the land was freehold.

SIR W. M. JAMES, V.C.:—

It appears to me that this question is really governed by authority. I might have been disposed, with Lord *Cranworth*, to consider that in all probability the framers of the statute did not mean to enlarge the rights of the specialty creditor, but meant only to preserve to him the priority which he had before the statute, namely, a priority as against what before the statute were legal assets. But if that was the intention it has not been so expressed, and I can only follow the judgment of Lord *Cranworth* in *Foster* v. *Handley* (1).

(1) 1 Sim. (N.S.) 200.

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Adjudicating upon assets, as I am, under this Act of Parliament, I must follow the language of the Act, and I accordingly hold that these specialty creditors must be paid in full before any of the simple contract creditors are paid.

Mr. *Cozens-Hardy* asked for the Plaintiff's costs as between solicitor and client, referring to *Burkitt* v. *Ransom* (1), before Vice-Chancellor *Knight Bruce,* which, however, was disapproved by Vice-Chancellor *Shadwell,* in *Weston* v. *Clowes* (2). The estate has been increased by the Plaintiff's exertions.

SIR W. M. JAMES, V.C.:—

In this case, as the Plaintiff began the suit in the least expensive way possible, and has had the conduct of it since, and as this summons was adjourned into Court at the special request of the Defendants, I think he is entitled to his costs as between solicitor and client.

Solicitors for the Plaintiff: Messrs. *Sharpe, Parkers, & Pritchard.*

Solicitor for the Defendants: Mr. *G. F. Cooke.*

Solicitor for the Specialty Creditors: Mr. *T. H. Williams.*

In re IMPERIAL GUARDIAN LIFE ASSURANCE SOCIETY.

V.-C. J. 1869 *Nov.* 20.

Company—Winding-up Petition—Action pending in respect of Petitioner's Debt —Offer by Voluntary Liquidators to be personally answerable for the Amount recovered in the Action—Costs.

Claimants against an assurance company in respect of a disputed policy brought an action. Shortly before the commencement of the action the company had agreed to sell and transfer their business to another company; and shortly afterwards they went into voluntary liquidation. The claimants then presented a Petition praying for the compulsory winding up of the company. About a month after the presentation of the Petition, the voluntary liquidators offered the Petitioners to hold themselves personally liable to

(1) 2 Coll. 526. (2) 15 Sim. 610; *Morgan* and *Davey* on Costs, p. 136.

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pay the Petitioners whatever might be adjudged due to them in the action; and to set aside out of the assets a sum sufficient to meet the claim, if it should be established, with interest and costs.

Petition ordered to stand over till after the trial of the action, the liquidators continuing the undertaking; and Petitioners ordered to pay all the costs of the Petition incurred since the offer.

THIS was a Petition presented by *Robert William Craik*, and *Lucy* his wife, praying for an order to wind up the *Imperial Guardian Assurance Company*.

The company was registered in April, 1867, as an unlimited company.

In 1868, *William Warren*, then the husband of the female Petitioner, took out a policy in the company on the joint lives of himself and his wife for £500. The policy was dated the 5th of March, 1868.

On the 24th of June, 1868, *Warren* died. At that date the premium due on the 5th of March had been paid, and the premium which fell due on the 5th of June was paid within the days of grace, on the 26th of June following.

On the 3rd of September administration to *Warren's* estate and effects was granted to his widow.

On the 12th of September, Mrs. *Warren*, by her solicitor, sent to the office a certificate of death, and a statutory declaration of identity. In reply, the secretary wrote, stating what further proofs would be required. Several letters followed, and at length, on the 22nd of October, the secretary wrote to say the directors were compelled to decline to admit the claim, on the ground that the policy was obtained by fraud.

On the 22nd of October, 1868, the Petitioners were married.

After further correspondence, the Petitioners' solicitor wrote on the 6th of January, 1869, threatening proceedings unless the £500 were paid on the following day.

On the 23rd of August a writ was issued at the suit of the Petitioners against the company; and on the 27th the company's solicitor wrote to the Petitioners' solicitor to say he had that day entered an appearance for the Defendants in the action, and that the company was "now in the course of liquidation."

The Petition, which was presented on the 28th of September, 1869, after stating the above facts, alleged that the charge of

fraud was wholly unfounded, and a mere excuse for non-payment of the claim; that the company was unable to pay its debts; and that it was just and equitable that it should be compulsorily wound up; and prayed accordingly.

From the affidavit, filed the 3rd of November, 1869, of the liquidators, one of whom was the late secretary, the other, the late consulting actuary of the company, it appeared that on the 28th of July, 1869, the company entered into an agreement with the *Great Britain Mutual Life Assurance Society* for the sale of their business to them; and on the 6th and 23rd of August, at extraordinary general meetings, a resolution was passed and confirmed approving of the agreement. On the 23rd of August and the 8th of September resolutions were passed and confirmed for the voluntary winding-up of the company.

They said that the Petitioners' claim was disputed on *bonâ fide* grounds, and that they believed there was a good defence to it on the merits.

The only claim at the present time upon, or debt due from the company, was the disputed claim of the Petitioners.

They further said, that with a view of saving expense, on the 28th of October last, they instructed their solicitors to offer to the Petitioners to hold themselves (the liquidators) personally liable to pay to the Petitioners the amount of the claim under the policy with interest, and all costs which might be adjudged to the Petitioners upon their establishing their claim; and to undertake in the meantime not to part with any of the assets of the company. They further offered, without prejudice, to set aside a sum sufficient to satisfy the claim, with interest and costs, to abide the event.

Two letters, embodying the above offers, were written and sent to the Petitioners' solicitors on the 28th of October and the 1st of November, 1869.

To the last the Petitioners' solicitor replied, on the 1st of November, that the Petition must proceed.

Mr. *Amphlett*, Q.C., and Mr. *Hemming*, for the Petitioners:—

The company are defending the action at law.

The VICE-CHANCELLOR:—You must satisfy me that the defence

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is a sham defence. A winding-up Petition is not to be used as machinery for trying a common law action.

Mr. *Amphlett*:—This Petition was presented on the 28th of September, and the liquidators' offer of guarantee was not till the 28th of October.

Mr. *Kay*, Q.C., and Mr. *Higgins*, for the company and liquidators, referred to *In re Catholic Publishing Company* (1), and upon the letters of the 28th October and the 1st of November being read, were stopped.

The VICE-CHANCELLOR asked the Petitioners' counsel to say why they should not pay all the costs incurred since the offer.

Mr. *Amphlett*:—The winding-up Petition must have gone on sooner or later. An unpaid creditor is entitled to a winding-up order *ex debito justitiæ*.

SIR W. M. JAMES, V.C.:—

Let the Petition stand over till after the trial of the action (the liquidators undertaking to continue the undertakings contained in their letters of the 28th of October and the 1st of November) in all respects, except that the Petitioners are to pay all costs that have been incurred subsequently to the offer.

If I can, I mean to prevent these winding-up Petitions being made the means of creating costs.

Solicitor for the Petitioners: Mr. *J. L. Alcock*.
Solicitor for the Company: Mr. *G. W. Barnard*.

(1) 2 D. J. & S. 116. 10 Jur. N.S. 301

HENSHAW *v.* ANGELL.

V.-C. J.
1870
Feb. 8.

Practice—Motion to vary Certificate—Time—Consolidated Orders xxxv., r. 52.

The Chief Clerk's certificate having been filed on the 12th of January, notice that the Court would be moved on the 31st of January to vary the certificate was served on the 19th :—

Held, that service of the notice of motion was not sufficient under Cons. Ord. xxxv., r. 52, to arrest the certificate; and that the motion, not having been made until after the eight days from filing the certificate had expired, was consequently not in time.

THIS was a motion on behalf of the Defendant, that the certificate of the Chief Clerk, dated the 23rd of December, 1869, might be varied.

A summons to vary the certificate was taken out by the Defendant on the 28th of December and heard before the Vice-Chancellor personally in Chambers on the 11th of January, 1870. The certificate was signed by the Vice-Chancellor on that day and filed on the following day (the 12th of January).

On the 19th of January notice that the Court would be moved on "Thursday the 31st day of January, 1870," to vary the certificate was served by the Defendant. On Thursday, the 31st of January, the last day of term and a seal day, the motion was saved.

Mr. *Langley*, for the motion.

Upon the motion being opened,

Mr. *Lindley*, for the Plaintiff, took the preliminary objection that the motion was not in time, according to Cons. Ord. xxxv., r. 52 (1), not having been made within eight days after the filing of the certificate. In *Cross* v. *Maltby* (2) the Court, to prevent the Plaintiff moving from being prejudiced by there being no seal day within the eight days, allowed the motion to be made on a day not a seal day. In this case the Defendant might have moved on the 20th of January, which was a seal day.

(1) "The time within which an application may be made by summons or motion to discharge or vary any certificate which has been signed and adopted by the Judge in Chambers, shall be eight clear days after the filing of such certificate."

(2) 8 W. R. 646.

V.-C. J. 1870 HENSHAW v. ANGELL.

Mr. *Langley* submitted that by giving notice of motion or obtaining a summons within the eight days, even though the motion was not brought on nor the summons returnable till after the expiration of the time, the certificate was arrested and the party was not prevented from moving: *Wycherley* v. *Barnard* (1).

SIR W. M. JAMES, V.C., said that he could not overrule the decision of Vice-Chancellor *Kindersley* in *Cross* v. *Maltby* (2). The applying for and obtaining a summons might be regarded as an application (having regard to Orders XLIX. and LI. of the 16th of October, 1852, and the observations of Vice-Chancellor *Wood* in *Wycherley* v. *Barnard*,) which service of a notice of motion could not be. There would be no order, therefore, upon the motion, as not being made in time.

Solicitors: *Angell; W. Tatham & Son.*

V.-C. J. 1870 *Feb.* 18.

WILSON *v.* WILSON.

Practice—Revivor—Death of One of Two Plaintiffs—Revivor unnecessary.

Bill by two persons, claiming, one to be tenant for life of an estate, the other to be tenant in fee (subject to the first Plaintiff's life estate) of one-third of the entirety, against a defendant, *T. W.*, who claimed the entirety by an adverse title, and other Defendants who claimed the remaining two-thirds under the same title as the second Plaintiff, alleging that *T. W.* had begun to cut timber on the estate, and threatened to cut the whole, and praying that he might be restrained.

The first Plaintiff died:—

Held, that revivor was not necessary; and that the surviving Plaintiff had a sufficient interest in the subject matter to continue the suit.

MOTION by a Defendant, *Thomas Wilson*, to dismiss the bill for want of prosecution.

The bill was filed originally on the 16th of March, and as amended on the 25th of March, 1868, was by *Sarah Wilson* and the Rev. *Benjamin Jowett* against *Thomas Wilson*, *John Fenteman*, *Joseph Burgess* and *Sarah* his wife, *Benjamin Tebbit* and *Margaret Caroline* his wife, *James Augustus Weir Nicholls* and *Grace Charlotte* his

(1) Jac. 41. (2) 8 W. R. 646.

wife, and *William Lawrence Ball*, praying that *Thomas Wilson* might be restrained from cutting timber, and for a receiver to sell and receive the purchase-money of such timber as had been cut, upon property which was devised by the will of *William Bilton*, dated the 12th of June, 1799, to his sister *Ann* for life, and after her decease to his nephew, *Bilton Josephus Wilson*, and his heirs.

William Bilton died in 1806; *Ann Bilton* died in 1819; and *Bilton J. Wilson* died in 1866, intestate as to this property.

The bill alleged that the Plaintiff *Jowett* and the Defendants *Fenteman, Sarah Burgess, Margaret C. Tebbit, Grace C. Nicholls*, and *W. L. Ball*, were the coheirs-at-law, and according to the custom, of *Bilton J. Wilson*, and were entitled to the property, subject to the life interest in the entirety thereof of the Plaintiff *Sarah Wilson*, who was *Bilton J. Wilson's* widow; *Jowett* being entitled to one moiety, *Fenteman* to one-fourth, and *S. Burgess, M. C. Tebbit, G. C. Nicholls*, and *W. L. Ball* to the remaining fourth.

The bill alleged that the Defendant *Thomas Wilson* had been for some time past residing in *America;* that he claimed an interest in the whole property as heir-at-law and customary heir of *Bilton J. Wilson;* that on the 9th of March, 1868, the Plaintiff was informed that *Thomas Wilson* had arrived in *England;* that on the 12th of March some persons in *Thomas Wilson's* employment entered upon the property, and proceeded to cut the timber; that *Thomas Wilson* had already cut down a considerable quantity, and intended to cut the whole; that the Plaintiffs would sustain irreparable injury; and that *Thomas Wilson* was shortly about to return to *America*, and if he were to receive the purchase-money and take it with him the value would be irrecoverably lost; and prayed for an injunction as above stated.

On the 13th of August, 1868, the Defendant *Thomas Wilson* filed an answer.

The Plaintiff, Mrs. *Wilson*, died in March, 1869, and her will was proved in May, 1869.

In November, 1869, a summons was taken out to adjourn the time to file replication or serve notice of motion for decree, but nothing had been done upon it notwithstanding numerous applications on the part of the Defendants, the surviving plaintiff alleging that the suit was abated.

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Mr. *Fry*, Q.C., for the Defendant *Wilson*.

Mr. *North*, for the surviving Plaintiff:—

"Where a suit abates by the death of one of several co-Plaintiffs, the Defendant may, on motion, obtain an order that the surviving Plaintiffs do revive within a limited time, or in default, that the bill stand dismissed with costs:" *Daniell's* Chancery Practice (1); *Adamson* v. *Hall* (2); *Chichester* v. *Hunter* (3).

"After a suit has abated, or after it has become defective by the bankruptcy of the Plaintiff, it is irregular to move for the ordinary order to dismiss the bill for want of prosecution:" *Daniell's* Chancery Practice (4); *Robinson* v. *Norton* (5).

The VICE-CHANCELLOR:—That was the case of a sole Plaintiff becoming bankrupt.

Yes; where a sole Plaintiff becomes bankrupt, you serve the assignees; but where one of two Plaintiffs becomes bankrupt you serve the other Plaintiff.

In *Hinde* v. *Morton* (6), where three residuary legatees were co-Plaintiffs in an administration suit, and one died before decree, it was held that the suit had not abated, and that revivor was unnecessary; and the order was that the Plaintiffs should proceed or the bill be dismissed; the Lord Chancellor, then Vice-Chancellor *Wood*, observing that the principle was that the remaining Plaintiffs could have obtained a decree, though not *simpliciter*, because the fact of the death would have to be notified in some way in order that the decree might be served on the personal representatives.

That principle does not apply here, because this is a suit in respect of the purchase-money of timber which has been cut, of which the deceased Plaintiff was tenant for life.

SIR W. M. JAMES, V.C., after referring to the allegations in the bill, continued:—

In this case I am of opinion that the surviving Plaintiff was fully entitled to go on with the suit.

(1) 4th Ed. p. 755.
(2) T. & R. 258; overruling S. C. 1 S. & S. 249.
(3) 3 Beav. 491.
(4) Page 756.
(5) 10 Beav. 484.
(6) 2 H. & M. 368.

The motion, therefore, is quite right, and there will be the usual order on motion to dismiss, unless notice of motion for decree be given or replication filed within a month; the Plaintiff to pay the costs.

Solicitors for the Plaintiff: Messrs. *Paterson & Co.*, agents for *Strother & Son, Killinghall, Yorkshire.*

Solicitors for the Defendant: Messrs. *Sharp & Ullithorne.*

M. R.

1870

Jan. 19, 20, 31.

HOBSON *v.* JONES.

Creditors' Deed—Inspectorship—Default of Receiver—Agent—Liability of Inspectors.

By a creditors' deed, which provided that the debtor should carry on his business under the supervision of inspectors, the debtor covenanted with the inspectors that he would allow *C.*, "who was intended by the inspectors to be employed as an accountant, or such other person as they might employ in lieu of *C.*," to collect and receive the moneys due to the debtor, and pay the balance into the bank. *C.* made default in payment of a large sum received by him:—

Held, that *C.* was not the agent of the inspectors, and that they were not liable to account to the debtor for *C.'s* misfeasance.

THE question in this case was, whether the inspectors of a debtor's estate were liable to make good to a debtor moneys received by an accountant appointed under an inspectorship deed, which he had not accounted for.

The debtor, *George Hobson*, who was a tailor, had executed a deed dated the 16th of December, 1858, made between himself of the first part, *Thomas Jones* and *George Thornton Clarke* (the inspectors) of the second part, and the scheduled creditors of the third part, which recited (among other things) that the debtor had become unable to pay his creditors in full, and that he had proposed to his creditors that time should be allowed him for payment of his debts by instalments, and that for that purpose he should be allowed to carry on his business without molestation from his creditors, and such proposal had been assented to on the terms of the business being carried on under the inspection and control of *Jones* and *G. T. Clarke;* and also reciting that they had assented to act as such inspectors, and that a declaration of insolvency had been signed by the debtors and delivered to the inspectors to be filed, if they should think fit. The deed contained the usual covenants on the part of the creditors with the debtor, and also on the part of the debtor with the inspectors, which contained the following stipulation: that he, the said debtor, "shall at all times allow *John Heard Clarke*, accountant, who is intended by the said inspectors to be employed as an accountant, and for the purposes there

expressed in and with reference to the business and affairs of the debtor, or such other person or persons in lieu of the said *J. H. Clarke*, as the said inspectors might from time to time appoint, to collect and receive all debts and moneys then due or to become due to the said debtor, and to pay the same weekly or otherwise, as the said inspectors might appoint, into an account to be kept at the *City Bank*, or such other bank as the inspectors might from time to time appoint, after deducting therefrom the current business expenses of the said debtor;" and also that the inspectors should retain or employ all such (if any) other persons as the inspectors should in that behalf require, for the purpose of assisting in the business, and permit all reasonable remuneration to be paid, and would concur in paying the same to *J. H. Clarke* and such other persons or servants (if any) as the inspectors should decide.

The deed contained no assignment to any one of the property or effects of the debtor, but a covenant with the inspectors to assign his property to them at their request.

An account was opened at the *City Bank* in pursuance of the deed, and was kept in the name of the debtor and *J. H. Clarke* up to the 2nd of December, 1861, when the title of the account was changed, and it was afterwards kept in the name of the inspectors alone.

The business was carried on by the debtor (who was the Plaintiff in the suit), under supervision, till March, 1863, when the Plaintiff entered into a partnership; his creditors were paid in full, and an end was put to the inspectorship.

On taking the accounts it appeared that a sum of £640 was due from *J. H. Clarke*, which he had not paid over to the inspectors. He became insolvent, and unable to pay; and in June, 1863, the Plaintiff filed his bill against the inspectors as Defendants, praying that an account might be taken of the receipts and payments of the Defendants, as inspectors under the deed, in respect of the book-debts due to, and the other assets and effects of, the Plaintiff from the date of the deed, and that the Defendants might be ordered to pay to the Plaintiff what should be found due to him upon the balance of their receipts and payments.

A decree was made, under which the Defendants were declared liable to account to the Plaintiff for moneys received by them,

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or by their order or for their use; and the usual inquiries were directed.

It appeared, on taking the accounts of the inspectors, that a sum of £640 was due from *J. H. Clarke*, the receiver under the deed, which he had not paid into the bank or accounted for. *J. H. Clarke* was insolvent. There was no allegation in the bill of *J. H. Clarke's* misfeasance, and the decree contained no directions as to wilful default of the inspectors.

The question arose in Chambers whether the Defendants were liable for the default of *J. H. Clarke*, as being their agent under the deed; or whether, by their subsequent misconduct and neglect, as to which a great deal of evidence was gone into, they had since rendered themselves so liable.

The case was adjourned into Court at the instance of the Chief Clerk.

Mr. *Roxburgh*, Q.C., and Mr. *Herbert Smith*, for the Plaintiff:—

The Defendants in this case are liable for the misfeasance of *J. H. Clarke*. By the terms of the deed of inspectorship, *J. H. Clarke* was to be the agent not of the debtor but of the inspectors. He was named in the deed as the accountant, whom the inspectors intended to employ, and he was merely to act as their servant, and they were bound to see that he accounted to them for all the money he received.

The obligations of inspectors under a creditors' deed were considered in *Chaplin* v. *Young* (1), but that case differed from the present, for there the person who had not accounted to the inspectors was himself authorized by the deed to receive the moneys, and could not be removed. Here the power is given to the inspectors from time to time to appoint any other person or persons in lieu of *J. H. Clarke*. Where inspectors have the power to appoint the person who is to receive the money and to remove him, they cannot escape the liability to see that the money he receives is properly accounted for.

Further, the evidence shews that, even if *J. H. Clarke* is not under the deed to be treated as the agent of the inspectors, they

(1) 33 Beav. 330.

have by their subsequent misconduct and neglect made themselves liable for the money which was thus misappropriated.

Mr. *Southgate*, Q.C., and Mr. *Cracknall*, for the Defendant *Jones*, and Sir *R. Baggallay*, Q.C., and Mr. *Swanston*, Q.C., for the Defendant, *G. T. Clarke*:—

The question of the liability of the Defendants for the moneys in question cannot properly be raised now, as it would be inconsistent with the decree, which does not make the Defendants liable for moneys not received through their wilful default. In *Partington* v. *Reynolds* (1) it was held that, where a decree for the common accounts had been obtained on an administration summons, the Court had no power to vary or add to the decree in Chambers by directing an account for wilful default: the same principle applies here. But, on the construction of the deed itself, we contend that the Defendants are not liable, for *J. H. Clarke* was named in the deed as the accountant to be employed; his duties were clearly defined; he was to receive the moneys due to the debtor from time to time, and to pay them into the bank, after deducting the current expenses. There is nothing by which he was constituted an agent for the inspectors; he was rather the agent for all the parties to the deed. The inspectors cannot be made liable for his default; they are only liable for the moneys actually paid into the bank; and no case of personal misconduct has been established against them which would render them liable.

Mr. *Roxburgh*, in reply.

Jan. 31. LORD ROMILLY, M.R.:—

This is an adjourned summons taken out, in fact, at the instance of the Chief Clerk, asking for directions how he is to proceed in taking the accounts directed by the decree. It raises a question of great importance, not merely to the parties themselves, as it will dispose of the substance of the cause itself, but also because it involves a principle of general application to traders which, so far as I know, or as I have been referred to any decided cases, has not hitherto been established.

(1) 4 Drew. 253.

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The facts which raise it are few and simple. [His Lordship having stated the facts continued:—] It was the duty of the inspectors to overlook the receiver, and to see that he duly rendered his accounts and paid over the balance in his hands to their account at the bank. The question is, was he their agent for getting in the debts of the concern? or, in other words, what is the peculiar relation which exists in an ordinary deed of inspectorship between the inspectors, the debtor, and the creditors? and when a receiver is appointed to get in the assets of the debtor, whose agent is he? and who, if any one, is liable for his misconduct in not accounting for his receipts?

An ordinary deed of inspectorship is, I think, merely a contrivance to enable the debtor to avoid becoming a bankrupt, and at the same time to give the creditors the best chance of obtaining payment of their debts, which the circumstances of the case seem likely to afford.

This deed is a fair specimen of such deeds. There is no assignment of any property. The debtor does not part with his full legal rights, nor with the whole of his power over either his business or his assets, but he does so to a considerable extent: he gives the inspectors a right to superintend and, whenever they consider it necessary, a power to control his dealings with both. It is consistent with the objects of such a deed that a person should be appointed receiver, and collect the moneys and debts due to the business, and that such a person should also be under the control of the inspectors, and be subject to being dismissed at their will and pleasure; but this does not, I think, make him the agent of the inspectors. All the legal powers which such a receiver possesses in the performance of this employment is derived from the debtor, and none of it from the inspectors; all that he derives from the inspectors is their sanction to the exercise of his employment in this particular manner; but for the purpose of rendering any person but himself liable for the moneys he receives, and not accounted for by him, he is not, in my opinion, the agent of any one in the strict sense of the term; but, if of any one, he is rather the agent of the debtor than of the inspectors. His position is somewhat analogous to that of a receiver appointed in a mortgage-deed, which is done occasionally where the mort-

gagee entertains some doubt about the punctual payment of the interest, and yet desires to avoid the consequences which attach to a mortgagee in possession. Accordingly, the mortgagor and mortgagee agree on a person who is appointed to be the receiver of the rents and profits of the mortgaged estate, but who is not to be called into action until default has been made in payment of the interest. When that occurs the receiver is authorized and required, upon the requisition of the mortgagee, to exercise the powers entrusted to him, that is, to receive the rents, and thereout to pay the interest due on the mortgage to the mortgagee, and the balance to the mortgagor; but he is not the agent of the mortgagee, who cannot be made liable to account on the principle of wilful default.

This view is confirmed by considering what would have occurred if the inspectorship had continued till now, and that after the misfeasance of *J. H. Clarke* had been discovered, the inspectors had taken steps to enforce payment of the balance due from him, or had prosecuted him for embezzlement. In either case, I apprehend, it would have been a proceeding in the name or on account of the debtor. If by civil proceeding, the action must have been in the name of the debtor, and if by criminal proceeding, it must, I apprehend, have been by an indictment against *J. H. Clarke* for embezzling the property of the debtor. The decree in this case is to compel the inspectors to account for moneys "received by them, or by their order, or for their use." I think that the moneys received by *J. H. Clarke* do not come within these words, and that the inspectors, though strictly liable for all moneys received by them, are not answerable for moneys embezzled or not accounted for by a person properly and necessarily employed by them, and with the assent of every one interested in the business carried on by them within the terms of the deed by which they were constituted.

In these cases, no doubt, everything depends on the terms of the deed; and, unquestionably, the frame of the deed might make inspectors liable for moneys not received by them if they thought fit to accept such an office. But there are no such words in the deed in question in this case; the strongest are only those which I have read and they do not impose any such obligation on the inspectors.

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The remaining question is one apart from that which I have been considering, although in some degree connected with it. It is whether the inspectors have by their own personal misconduct made themselves liable for the moneys received by *J. H. Clarke*. For this purpose I have carefully read and considered the evidence adduced on behalf of the Plaintiff. [His Lordship then reviewed the evidence, and continued:—] I cannot, therefore, on account of the conduct of the inspectors, make them liable for moneys which, under the terms of the deed itself, they would not be liable to account for or make good.

I am of opinion that I must answer the Chief Clerk's inquiry by directing him not to charge the inspectors with the money received by *J. H. Clarke*. I shall give this direction without any order as to the costs of this summons, principally because it is an application by the Chief Clerk to be instructed how he is to proceed in taking the accounts, which might, as far as I can see, have been determined at the hearing of this cause, and also because I think the inspectors ought to have exercised a more diligent supervision over *J. H. Clarke* than they seem to have done. If gentlemen undertake an office, they should duly and diligently discharge the duties they have undertaken.

I do not go into the question argued before me about the case made by the bill, and the suggestion that the case insisted on by the Plaintiff was an attempt to introduce into the decree a case of liability for wilful default. If I had considered the Defendants liable on the facts, I should have had no difficulty in making them account, either under this decree or under the power of stating circumstances specially, which I always reserve to myself, and which I exercise whenever I think it necessary, in any decree directing accounts and inquiries to be prosecuted in my Chambers.

I regret that my opinion on this point was not taken at the original hearing.

Solicitor for the Plaintiff: Mr. *C. Baylis*.

Solicitors for the Defendants: Mr. *Oliver Richards;* Messrs. *Linklaters, Hackwood, & Addison.*

JARRATT *v.* ALDAM.

M. R.

1870

Feb. 9, 10, 23.

Voluntary Settlement—Suit to set aside—Subsequent Confirmation.

Where a settlor filed a bill to obtain the declaration of the Court that a settlement executed by him eleven years previously was not binding upon him by reason of its being an unreasonable one, and of his having executed it in ignorance of its effect:—

Held, that a subsequent deed executed by the Plaintiff, reciting part of the former deed, and purporting to be in exercise of one of the powers therein contained, was an absolute confirmation of the whole, and was a bar to the Plaintiff's suit, though the deed was one which, apart from lapse of time and subsequent confirmation, the Court could not have upheld.

THE object of this suit was to obtain a declaration of the Court that an indenture of re-settlement executed by the Plaintiff on his attaining the age of twenty-one might be declared not to be binding upon him.

The Plaintiff, on attaining the age of twenty-one, on the 16th of April, 1857, became entitled under the will of his father, who died in May, 1856, to certain freehold estates as tenant in tail male in possession.

The Plaintiff was induced to execute the re-settlement in question by the advice of Mr. *Edmund Denison*, a friend of the family, who instructed Messrs. *Baxter & Co.*, of *Doncaster*, the family solicitors, to prepare a disentailing deed, and also the deed of re-settlement for the Plaintiff's execution.

By the disentailing deed, which was dated on the 17th of April, 1857, the Plaintiff barred the estate tail and the estates in remainder under his father's will, and by the deed of re-settlement, dated the 18th of April, 1857, and made between the Plaintiff of the one part, and the trustees of the deed of the other part, the estates in question were limited to the use of the Plaintiff for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of his brother, *John Jarratt*, for life, with remainder to the use of the first and other sons of *John Jarratt* in tail male, with remainder to the use of the Plaintiff's daughters in tail male, with remainders over, and with power for the Plaintiff to raise a jointure of £300 for any woman that he might marry, and also to raise £6000 as portions for younger children.

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In 1859 the Plaintiff married, and by the settlement made in contemplation of his marriage, dated the 28th of November, 1859, after reciting that by the said indenture of re-settlement of the 18th of April, 1857, the estates therein comprised were settled and limited to the uses and subject to the powers therein and in the said indenture of re-settlement mentioned, the Plaintiff, in exercise of the jointuring power contained in the indenture of settlement, granted unto his intended wife a yearly sum of £300 with the usual powers for enforcing payment thereof, and also charged the estates comprised in the said indenture of re-settlement with the sum of £6000 for the younger children of the marriage.

There were no children of the marriage.

On the 31st of March, 1858, the Plaintiff filed his bill against the trustees of the settlement and the persons interested in remainder under the deed of the 18th of April, 1857, alleging that he executed that deed in ignorance of its true intent and purport, and that he was not aware of its effect until in 1865, when he obtained possession of the deed, which was in the hands of the trustees, and ascertained what its provisions were.

The bill prayed that the indenture of re-settlement might be declared not to be binding upon him, but without prejudice to the jointure and portions charged by the Plaintiff on his marriage.

The Defendants contended, and adduced evidence in support of such contention, that the Plaintiff was fully aware of the nature of the deed at the time of its execution, that his subsequent acts shewed that he acquiesced in it, that his marriage was contracted on the faith of the deed, and that his marriage settlement was a confirmation of the deed.

Mr. *Baxter*, the solicitor, who prepared the deed, made an affidavit stating the circumstances under which the deed was executed, and said that the Plaintiff appeared fully to understand its effect.

Sir *Roundell Palmer*, Q.C., Sir *Richard Baggallay*, Q.C., and Mr. *C. Hall*, for the Plaintiff:—

The circumstances of this case are such as will induce the Court to declare that the deed of re-settlement was not binding on the Plaintiff on the terms of the Plaintiff's giving effect to the pro-

visions of his marriage settlement, which he offers to do by his bill.

The evidence shews, as we submit, that the Plaintiff did not become aware of his rights or of the true effect of the deed till 1865, and had no independent advice, and, though this bill was not filed till nearly eleven years after the execution of the deed of re-settlement, yet that is not material when a Plaintiff is in ignorance of his rights.

The principles on which the Court acts in such cases were fully considered in *Hoghton* v. *Hoghton* (1), where a deed of family settlement, which, in the opinion of the Court, was not proper or reasonable, was set aside.

That lapse of time is not in itself a bar to a suit for setting aside a voluntary settlement is shewn in the recent case of *Wollaston* v. *Tribe* (2), where a settlement was set aside after a lapse of ten years; and in *Coutts* v. *Acworth* (3), where five years elapsed between the date of the settlement which was set aside and the filing of the bill.

Here, apart from the question of the Plaintiff's subsequent marriage, the deed in question, which was executed by the Plaintiff without independent advice, could not be supported, and his rights are, we submit, unaffected by the lapse of time, and as he offers to confirm the provisions under his marriage settlement he is not by that settlement precluded from the relief now prayed for.

Mr. *Southgate*, Q.C., and Mr. *Streeten*, for the trustees.

Mr. *Jessel*, Q.C., and Mr. *W. Pearson*, for the persons entitled in remainder under the deed of re-settlement:—

The Plaintiff has failed to make out his case for the interference of the Court. The re-settlement was not in itself unreasonable, and the evidence on which the Plaintiff seeks to establish that he was not aware of the purport of the deed is rebutted by other evidence, and is inconsistent with his own conduct.

Further: lapse of time and acquiescence are a complete bar to

(1) 15 Beav. 278. (2) Law Rep. 9 Eq. 44.
(3) Law Rep. 8 Eq. 558.

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such a suit, and the Plaintiff has not only gone on for years with a knowledge of his rights, but has confirmed the deed; his marriage was contracted on the faith of this deed, and by his marriage settlement the deed was recited, and the Plaintiff made the rights of others to depend upon it.

In *Wright* v. *Vanderplank* (1) subsequent acts of acquiescence were held to be a bar to such a suit even where the transaction was one that but for such acquiescence might have been set aside.

Sir *R. Baggallay*, in reply.

Feb. 23. LORD ROMILLY, M.R., after stating the facts of the case and the circumstances under which the settlement was executed, said that the deed was prepared by Messrs. *Baxter & Co.*, under the instructions of Mr. *Denison*, acting with the best possible motives, and His Lordship considered that though the matter was explained to the Plaintiff at the time, he did not then understand the full effect of the deed, and was controlled by the advice of an old family friend. His Lordship then continued:—

If the Plaintiff had come within a reasonable time afterwards, and no steps had taken place subsequently, I do not see how the deed could have been maintained, and I think this Court must have directed it to be set aside.

But the subsequent transactions give a totally different character to the whole case. This bill is not filed until January, 1868, nearly eleven years after the transaction. In addition to that, in 1859 the Plaintiff married a lady, and he made a settlement upon her marriage. The bill was very properly so framed by Mr. *Hall*, that by the Plaintiff's offers everything which was done by his marriage settlement would be confirmed, but I do not think that is sufficient. In my opinion he has confirmed the whole of the transaction absolutely, and he is not at liberty to say, "I will adopt one part of it which I have adopted hitherto," and set aside the rest. By his marriage settlement he exercised in favour

(1) 2 K. & J. 1; 8 D. M. & G. 133.

of his wife the power of jointuring given by the deed which is now impeached, and he also made provision for the younger children. At that time it is quite clear that the marriage was entered into upon the faith of the former settlement. [His Lordship read the evidence relating to this, and continued]:—

In the case of *Milner* v. *Lord Harewood* (1), Lord *Eldon* expressly held that where a person confirmed a portion of a deed, with nothing more, it operated as a confirmation of the whole transaction.

I am of opinion that that must be so treated here. It is impossible for the Plaintiff to say he did not know the nature of the deed of 1857 until 1865, when he got it into his possession, because it is obvious that it was perfectly well known to him at the time of his marriage in 1859.

My opinion is that, regarding the whole of the transactions, the Plaintiff cannot, after the acts on his part, now come here to set aside the settlement.

The result is that in my opinion I must dismiss the bill, but I shall not give any costs.

Solicitors for the Plaintiff: Messrs. *Reed, Phelps, & Sidgwick*, agents for Messrs. *Sale & Co., Manchester*.

Solicitor for the Defendants: Mr. *R. Baxter*, agent for Messrs. *Baxter & Co., Doncaster*.

(1) 18 Ves. 259.

M. R.

1870

Feb. 14, 15, 23.

DAVIES *v.* DAVIES.

Infant's Settlement—Reversionary Interest—Married Woman—Voidable Deed—Confirmation.

2 C.L.D. 394.6

A female infant, upon her marriage, executed a settlement of two funds of personalty to which she was entitled in reversion expectant on the determination of certain life interests. She survived her husband, and while she was his widow one of the funds fell into possession, and was, by her direction, paid to the trustees of the settlement, to be held upon the trusts thereof. Before the second fund fell into possession she had become a lunatic:—

Held, that, in the absence of any evidence to the contrary, she must be taken to have confirmed the settlement *in toto*, and that the second fund, when it fell into possession, was subject to the trusts thereof.

ELIZABETH DAVIES, the Plaintiff in this suit, was, previous to her marriage with *James Davies*, entitled to an undivided share of the residuary personal estate of *Thomas Perrior*, and to an undivided share of the residuary personal estate of *William Small*, subject, as to both shares, to the life interest therein of her mother, *Elizabeth Small*. In contemplation of the marriage an indenture, dated the 9th of September, 1841, was executed by *Elizabeth Davies* (then *Elizabeth Small*, spinster, and an infant under the age of twenty-one years), whereby she purported to assign her shares of the two estates (subject to the life interest therein of her mother) to trustees upon certain trusts, being, in substance, for herself during her life for her separate use without power of anticipation, and after her decease for *James Davies*, her husband, during his life, and after the decease of the survivor of them for the child or children of the marriage (if more than one) in equal shares.

James Davies died on the 21st of May, 1846, having had issue one child only, *Elizabeth Small Davies*.

In March, 1859, *Elizabeth Small* gave up her life interest in the residuary personal estate of *William Small*, and the trustees of his will, by the direction of the Plaintiff, paid her share of *William Small's* estate to the trustees of the Plaintiff's marriage settlement.

In July, 1862, *Elizabeth Small* died, and the Plaintiff's share of the residuary personal estate of *Thomas Perrior* fell into possession. The Plaintiff appeared to have been at that time of unsound mind, and in November, 1863, she was so found by inquisition.

In 1865 *Elizabeth Small Davies* died, having by her will bequeathed her personal estate to the Defendants *Smith* and *Stevens* upon certain trusts. Upon her death the question was raised, whether or not the share of Plaintiff in the residuary estate of *Thomas Perrior* was subject to the trusts of the Plaintiff's marriage settlement; and the object of the suit was to obtain the decision of the Court as to that question, and certain other questions which it is unnecessary, for the purposes of this report, to state in detail.

Mr. *Jessel*, Q.C., and Mr. *Buchanan*, for the Plaintiff, submitted that the settlement, having been executed by the Plaintiff while she was infant, did not bind her, and was, in fact, the settlement of her husband only, and consequently that she was herself entitled to her share of *Thomas Perrior's* estate.

Mr. *Southgate*, Q.C., and Mr. *Busk*, for the trustees of *Elizabeth Small Davies'* will:—

The deed of an infant is voidable, not void; and if the infant disclaims within a reasonable time after attaining twenty-one, the deed is avoided, otherwise it binds the infant: *Zouch* v. *Parsons* (1); *Dublin and Wicklow Railway Company* v. *Black* (2); *Lumsden's Case* (3). Here the infant, upon attaining twenty-one, was under the disability of coverture, but she became discovert in 1846, and from that time up to the time of her becoming of unsound mind she never disclaimed the deed, and consequently it is binding on her.

But the case does not rest here, for she has actually confirmed the deed in part by directing her share of the residuary estate of *William Small* to be paid to the trustees thereof; and having confirmed it in one respect, she must be taken to have confirmed it *in toto*: *Milner* v. *Lord Harewood* (4); *Ashton* v. *M'Dougall* (5); *Harvey* v. *Ashley* (6).

Mr. *W. W. Cooper*, for the trustees of the settlement.

(1) 3 Burr. 1794.
(2) 8 Ex. 181.
(3) Law Rep. 4 Ch. 31.
(4) 18 Ves. 259, 277.
(5) 5 Beav. 56.
(6) 3 Atk. 607.

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Mr. *Jessel,* in reply:—

In *Milner* v. *Lord Harewood* (1), Lord *Eldon* was speaking of election in its strict meaning, and was not expressing any opinion to the effect of a partial confirmation of a void instrument. If a person takes part of a benefit under a voidable instrument, he cannot repudiate the rest; but if he agrees to settle *Blackacre* and *Whiteacre,* and the agreement is void, he does not, by saying, "I confirm it as to *Blackacre,*" confirm it as to *Whiteacre* also.

Ashton v. *M'Dougall* (2) was also a case of election; for though no property was settled by the husband, the wife was, at the time of her marriage, entitled to personal estate in possession, to which the husband, but for the settlement, would have been entitled. The wife married a second and a third time on the faith that this settlement was binding, and had taken the benefit of it; and Lord *Langdale* relies on these facts, and his so doing shews that, in his judgment, the ordinary rule as to infants disclaiming contracts by which they do not wish to be bound does not apply to marriage settlements.

In the ordinary case an infant is taken to know what contracts he has entered into, for they must have been entered into a short time before he attains majority, and under these circumstances a short time is given him to choose whether he will take the benefit of it. That does not apply where coverture intervenes.

What an infant is required to repudiate is the benefit of the contract. If the contract is not for his benefit, it is void. There is no case in which it has been held that an assignment by an infant of all his estate to trustees, so as to give himself a life estate only, is for his benefit. This especially applies to the case of an assignment by a married woman of her reversionary interest. A married woman has never been held to be bound by a settlement of such an interest, although she might have been benefited thereby if it had fallen into possession during coverture.

I contend, therefore, that the settlement was void as against the Plaintiff; that it has never been confirmed by her as to the fund in question, much less adopted by her; and, therefore, that she is absolutely entitled to the fund.

(1) 18 Ves. 259, 277. (2) 5 Beav. 56.

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Feb. 23. LORD ROMILLY, M.R., after stating the facts, continued:—

As the Plaintiff was an infant when she executed the deed, the deed was voidable, and would require some act on her part to effect a confirmation. But I think that what she has done is a confirmation of the whole deed, and that the observations of Lord *Eldon* in *Milner* v. *Lord Harewood* (1) apply to the case. It is quite clear that, by directing the fund which fell into possession in 1859 to be paid to the trustees, and invested on the trusts of the settlement, she confirmed the settlement in part; and, in the absence of any act to the contrary, she must be taken to have intended to confirm the whole of it. She has since become a lunatic, and her intention cannot now be known; but I think she had previously confirmed the deed *in toto*, and I must make a declaration accordingly.

Solicitors: Messrs. *Venning, Robins, & Venning.*

verruled. HILL *v.* WILLIAM HILL (PARK LANE), LTD. [1949] 2 All E.R. 52.

verruled. HILL *v.* WILLIAM HILL (PARK LANE) LD. [1949] A. C. 530

BUBB *v.* YELVERTON.

M. R.
1870
Feb. 26.

Bond—Consideration—Racing Debt.

A bond given to persons to whom the obligor had lost bets on horse-races, which he was unable to pay, in order to prevent them from taking the steps which, under the conventional code established among betting men, they were entitled to take, and which would have been followed by consequences involving the obligor in considerable pecuniary loss:—

Held, to be valid, and proveable against the obligor's estate. Whether a bond given simply to secure a racing debt is valid, *quære.*

THIS was a suit for the administration of the estate of the late Marquis of *Hastings;* and the present summons was taken out in order to determine the validity of a claim by *Henry Steel* and *William Nicholls* to prove against the estate on a bond for £10,000, dated the 16th of June, 1868, and executed by the Marquis and by the Earl of *Westmoreland* as a surety for him. This bond was given under the following circumstances:—

The Marquis of *Hastings* was much engaged in horse-racing,

(1) 18 Ves. 259, 277.

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and had in his own name entered many horses for races, and in respect of such entries he had paid, or was liable to pay, certain stakes and forfeits. Some of these horses he had afterwards sold with their engagements. He also betted largely upon horse-races, and had made bets with Messrs. *Steel* and *Nicholls* and other persons to a very large amount. In the spring of 1868 he fell into pecuniary difficulties, and was unable to pay his debts, and *Steel* and his other creditors threatened to bring the matter before the *Jockey Club*, and to post the Marquis at *Tattersall's* as a defaulter. If these threats had been carried into execution, the result would have been that no horse entered in the name of the Marquis (whether belonging to him or to a subsequent purchaser) could have run in any race, subject to the rules of the *Jockey Club*. In order to prevent this, negotiations took place between the Marquis and his betting creditors, and they ultimately agreed to accept, in satisfaction of their claims, a sum of £10,000, to be paid immediately, and a further sum of £10,000 to be paid six months afterwards. The payment of this further sum was secured by the bond in question.

Sir *Roundell Palmer*, Q.C., Mr. *Southgate*, Q.C., and Mr. *W. W. Knox*, for the claimants:—

It will be contended, on the other side, that this bond was given to secure a racing debt, and is void; but we say, in the first place, that the consideration for the bond was the abandonment by his racing creditors of proceedings against the Marquis of *Hastings* before the conventional tribunal of the *Jockey Club;* and, in the next place, that a wagering contract is not illegal, and that a bond given to secure a wager is not illegal, but simply voluntary; and as all the creditors of the Marquis for valuable consideration have been paid in full we do not care to claim any higher position.

As to the latter point, the state of the law is as follows:—By 9 Anne, c. 14, all notes, bills, bonds, judgments, mortgages, or other securities or conveyances, where the whole or any part of the consideration is for money won by gaming, are made utterly void. By 5 & 6 Will. 4, c. 41, s. 1, so much of certain Acts (including 9 Anne, c. 14), as enacted that any note, bill, or mortgage, should be absolutely void, was repealed; but any note, bill,

or mortgage which, but for the passing of the Act in question, would have been absolutely void, is to be deemed as having been made or given for an illegal consideration, and the repealed Acts are to have the same force and effect which they would have had if, instead of enacting that such notes, bills, and mortgages should be absolutely void, they had enacted that such notes, bills, and mortgages should be deemed and taken to have been made or given for an illegal consideration. By 8 & 9 Vict. c. 109, s. 15, so much of 9 Anne, c. 14, as was not altered by 5 & 6 Will. 4, c. 41, is absolutely repealed; and by s. 18 all contracts and agreements, whether by parol or in writing, by way of gaming or wagering, are to be null and void, and no suit is to be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to have been won upon any wager.

Under these statutes, bills, notes, and mortgages given to secure a wager are to be deemed as having been given for an illegal consideration; but bonds and judgments now stand in the same position as if the Act of 9 Anne, c. 14, had never been passed. Now, a wagering contract is not illegal; and a security given for it is only voluntary: *Fitch* v. *Jones* (1); *Hill* v. *Fox* (2); *Rosewarne* v. *Billing* (3); *Fisher* v. *Bridges* (4); *Johnson* v. *Lansley* (5); *Hawker* v. *Wood* (6); *Hawker* v. *Halliwell* (7). These authorities shew that you cannot sue on a wagering contract; but if you pay a bet, the money cannot be recovered back, as would be the case if a wagering contract were illegal.

Sir *R. Baggallay*, Q.C., and Mr. *Pemberton*, for the residuary legatees of the Marquis:—

The Act of *Anne* is founded on general principles of morality, and renders void all securities for gaming debts. The Act 5 & 6 Will. 4, c. 41, makes valid such securities in the hands of purchasers for value without notice; but it is now sought to render valid a security in the hands of the persons to whom it was originally

(1) 5 E. & B. 238.
(2) 4 H. & N. 359.
(3) 15 C. B. (N.S.) 316.
(4) 2 E. & B. 118; 3 E. & B. 642.
(5) 12 C. B. 468.
(6) 1 W. R. 316.
(7) 3 Sm. & Giff. 194.

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given. The way in which it is attempted to arrive at this result is by putting a strict and narrow construction on the words of the Act, which are, in the enacting part, "note, bill, or mortgage;" but the preamble recites the Act of *Anne*, and refers to "instruments," and we contend that it is impossible to put this narrow construction on these words. The only rational construction is obtained by holding that all such securities are placed on the same footing, and are all to be treated as given for an illegal consideration. Further, we say that this is a proceeding to recover a debt due on a wager, and falls within the prohibition in s. 18 of 8 & 9 Vict. c. 109: *Hay* v. *Ayling* (1), *Hill* v. *Fox* (2).

It is contended, however, that there is good consideration for this bond, inasmuch as the Marquis of *Hastings* was enabled to run the horses entered in his name. But if a contract be made on several considerations, one of which is illegal, the whole will be void: *Collins* v. *Blantern* (3); *Waite* v. *Jones* (4).

Mr. *Jessel*, Q.C., and Mr. *Charles Hall*, for the executors of the Marquis, took no part in the argument.

LORD ROMILLY, M.R.:—

I have no doubt the bond is a perfectly good bond, and can be proved against the estate. I do not mean to express any opinion, whatever I may think upon the subject, whether, if a person incurs debts in racing, and gives a bond for payment of them, the bond can be proved against his estate. But here there was a perfectly good consideration quite ulterior to and independent of any racing debt. It is impossible to read the evidence without seeing that it was given, not to pay racing debts, but to avoid the consequences of not having paid them. The racing creditors of the Marquis were determined to enforce their debts by all the means within their power. The consequences of their doing so would have been very serious to the Marquis, and would have cost him a very considerable sum of money; not that he (and it is just to his memory to say so) ever intended to avoid paying these debts, but he had not the means of doing so at the time. He had

(1) 16 Q. B. 423.
(2) 4 H. & N. 359.
(3) 1 Sm. L. C. 346, 6th ed.
(4) 1 Bing. N. C. 656.

got into great difficulties, and, assisted by Lord *Westmoreland*, he gave the bond. He was compelled to do so by the circumstance that Mr. *Steel* and Mr. *Nicholls* would have taken steps respecting him with the *Jockey Club*, which would not only have been exceedingly painful to him, but would besides have involved him in very serious and considerable pecuniary liabilities in the shape of forfeiting stakes, and in the shape of having to answer actions by persons who had bought horses from him under the promise and faith that they had engagements which they could fulfil, but which, by reason of his misconduct, they were unable to perform.

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I am of opinion, therefore, that the obligees on this bond are entitled to prove the bond against the estate; and they must be entitled also to prove for the costs of this proceeding.

Solicitors: Messrs. *Pemberton & Reeves;* Messrs. *Barlow, Bowling, & Williams;* Messrs. *Blake & Harris.*

SYMES *v.* HUGHES.

SYMES *v.* HUGHES.

M. R. 1870 *March* 7, 9.

Illegal Trust—Recovery of Trust Property by Settlor—Bankruptcy—Arrangement—Composition—Bankruptcy Act, 1861, *s.* 110.

Although, where a trust has been created for an illegal purpose, the Court will not in general interfere, it will do so where the illegal purpose fails to take effect.

Where, therefore, the Plaintiff, being in pecuniary difficulties, assigned certain leasehold property to a trustee with the view of defeating his creditors, and two and a half years afterwards was adjudicated bankrupt, but obtained the sanction of the creditors under s. 110 of the *Bankruptcy Act*, 1861, to an arrangement by which his estate and effects were re-vested in him, he covenanting to prosecute a suit for the recovery of the assigned property, and to pay a composition of 2*s.* 6*d.* in the pound to his creditors in case such suit had a successful termination:—

Held, that the Plaintiff was entitled to have the property re-conveyed to him by the Defendant, who claimed by assignment from the original trustee.

Semble, an arrangement by which the estate of a bankrupt is re-vested in him in consideration of a money composition is valid under s. 110 of the *Bankruptcy Act*, 1861.

16 Ch D 290
16 Ch D 551

IN the beginning of 1865 the Plaintiff, *John Symes*, was in pecuniary difficulties, and had allowed judgment to go against him by

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default for a debt of £30; under which execution had been issued, and the amount of the debt and costs levied. Under those circumstances, one *Mary Maddox*, a widow, with whom the Plaintiff was on terms of intimacy, urged the Plaintiff to convey to her some part of his property as a means of securing it against his creditors; and accordingly a deed, dated the 1st of May, 1865, was prepared and executed by the Plaintiff, whereby the Plaintiff, in consideration of £170 therein expressed to be paid to him by Mrs. *Maddox*, purported to assign to her certain leasehold property, subject to several mortgages subsisting thereon. A receipt for £170 was indorsed on the deed and signed by the Plaintiff, and the title-deeds relating to the property were handed by the Plaintiff to Mrs. *Maddox*. In fact, however, no consideration was paid by Mrs. *Maddox* to the Plaintiff; and in the opinion of the Court it was the intention of both parties that Mrs. *Maddox* should hold the property upon trust for the Plaintiff.

In October, 1865, Mrs. *Maddox* became ill, and left the Plaintiff's house, where she had been living, for the purpose of residing with her daughter, the wife of the Defendant *George Hughes*. Before she left, she, at the Plaintiff's request, handed over the title-deeds, including the assignment of May, 1865, to him; but she was not required by the Plaintiff to execute any re-assignment of the property. Afterwards the Plaintiff seemed to have become aware of the necessity of a re-assignment and to have made some applications to her for that purpose while she was residing in the Defendant's house; but without success.

On the 9th of December, 1865, she executed an assignment of the property comprised in the deed of the 1st of May, 1865, to the Defendant, who thereby covenanted to provide her with board and lodging during her life. On the 6th of January, 1866, she died.

After her death the Defendant laid claim to the property, and commenced an action at law for the purpose of recovering possession of the deed of the 1st of May, 1865; and thereupon the Plaintiff filed the bill in the first of these causes, and thereby charged that Mrs. *Maddox* was a trustee of the property comprised in the deed of the 1st of May, 1865, for the Plaintiff, and that the Defendant had full knowledge of the fact at the date of the assignment to him, and prayed that the Defendant might be declared to be a

trustee of the property for the Plaintiff and might be ordered to convey the same to the Plaintiff, and for an injunction to restrain the Defendant from receiving or intermeddling with the rents and profits, and from proceeding with his action at law. The Defendant appeared to the suit, and put in an answer. Replication was filed on the 4th of March, 1867, and the cause was set down for hearing in August, 1867.

On the 9th of January, 1868, before the original cause could be heard, the Plaintiff was adjudicated bankrupt; but at the first meeting of creditors under the bankruptcy, held on the 29th of January, 1868, it was proposed by the bankrupt, in pursuance of the provisions of sect. 110 of the *Bankruptcy Act*, 1861, that the assignee under the bankruptcy should by deed re-vest all the estate and effects of the bankrupt in him, and that the bankrupt should by such deed covenant at his own expense to prosecute the original suit to a termination, and should by the same deed covenant, in the event of a decree in his favour in the said suit being made and sustained, to pay to all his creditors a composition of 2*s.* 6*d.* in the pound in discharge of their debts; and it appeared to a majority in value of the creditors present at the said meeting that such proposal should be accepted, and it was resolved by the same majority that no further proceedings in the bankruptcy should be taken; and the meeting was adjourned to the 12th of February, in order to give notice of the resolution to every creditor, as required by the Act. At the adjourned meeting it was resolved by a majority in number, representing three-fourths in value of the creditors then present, that the proceedings in bankruptcy should be suspended (except for the purpose of the bankrupt applying for and obtaining an order of discharge) and that the estate and effects of the bankrupt should be wound up and administered according to the terms of his said proposal.

The Plaintiff obtained his order of discharge on the 13th of April, 1868. On the 14th of December, 1868, a deed was executed by the Plaintiff and the assignee in the bankruptcy, by which the Plaintiff's estate and effects were revested in him; and he entered into covenants with the assignee to the effect mentioned in the proposal.

These facts were stated by a supplemental bill filed by the

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Plaintiff against *George Hughes*, the Defendant in the original cause, in pursuance of an order made by the Lords Justices on the 26th of February, 1869, upon which occasion the assignee in bankruptcy appeared, and declined to take any proceedings in the original cause. The Defendant was not a creditor of the Plaintiff.

The original and the supplemental cause now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *Freeling*, for the Plaintiff.

Mr. *Haynes* (Sir *R. Baggallay*, Q.C., with him), for the Defendant:—

The Plaintiff, on his own shewing, made the assignment with the view of defeating his creditors; and the Court will not interfere between him and the Defendant so as to give effect to an illegal object. The maxim "*In pari delicto potior est conditio possidentis*," applies: *Duke of Bedford* v. *Coke* (1); *Curtis* v. *Perry* (2); *Brackenbury* v. *Brackenbury* (3); *Taylor* v. *Chester* (4).

Further, the resolution passed by the creditors of the bankrupt was wholly unauthorized by the 110th section of the *Bankruptcy Act*, 1861. That section sanctions only a resolution for the purpose of winding up and administering the estate and effects of the bankrupt: here the object is not to administer the estate, but to effect a composition. No case has been decided as to the construction of this section; but under sect. 224 of the Bankruptcy Act of 1849, which contained provisions for the winding-up and distribution of the estate of the bankrupt, it was repeatedly held that no arrangement was valid unless it included a *cessio bonorum*: *Drew* v. *Collins* (5). Text writers have taken a similar view of the present section: *Griffiths and Holmes* on Bankruptcy (6).

Mr. *Southgate*, in reply (he was not called upon as to the second point):—

Although a person may make a conveyance for the purpose of defrauding his creditors, still, if his purpose is not carried into effect, he is entitled to have his property restored to him, and it would be a fraud on the part of the trustee to retain it: *Davies* v.

(1) 2 Ves. Sen. 116.
(2) 6 Ves. 739.
(3) 2 Jac. & W. 391.
(4) Law Rep. 4 Q. B. 309.
(5) 6 Ex. 670.
(6) Vol. ii. p. 988.

Otty (1). Here no steps were taken by the creditors until nearly three years after the execution of the deed, and now the property is in fact being recovered for their benefit; and under these circumstances the Plaintiff is entitled to a decree: *Birch* v. *Blagrave* (2); *Platamone* v. *Staple* (3).

Mar. 9. LORD ROMILLY, M.R., after stating the facts, and saying that he was of opinion that Mrs. *Maddox* was a trustee for the Plaintiff, continued:—

Two objections have been raised on behalf of the Defendant. The first is, that the assignment was made for an illegal purpose, and it is said that such being the case, the Court will not interfere. I think the correct answer to this was given by Mr. *Southgate*, namely, that where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it. It is clear in the present case that no harm has been done to any creditor, and, in fact, the suit is now being prosecuted for the purpose of enabling the creditors to recover something.

The second objection is this: it is said that this arrangement cannot be valid under the 110th section of the *Bankruptcy Act*, 1861, because it is not an arrangement for the administration of the property of the bankrupt. But I am of opinion that it is within the spirit of the section, which ought to receive a liberal construction, and that any arrangement made between a bankrupt and his creditors with respect to the bankrupt's property may be carried into effect under this clause. At all events, I have no jurisdiction to set aside the arrangement, and therefore there must be a decree according to the terms of the prayer of the bill, and the Defendant must pay the costs of the suit.

Solicitors: Messrs. *Bridges, Sawtell, & Co.*, agents for Mr. *J. G. Price, Abergavenny;* Mr. *R. J. Child*, agent for Mr. *James Sayce, Abergavenny.*

(1) 35 Beav. 208. (2) Amb. 264. (3) G. Coop. 250.

M. R.
1869
Dec. 13, 14.
1870
Jan. 15.

GENERAL EXCHANGE BANK *v.* HORNER.

Company—Director, Duty of—Payments to Directors—Non-disclosure of Facts.

L. agreed with the directors of Bank *A.* to negotiate an amalgamation of the businesses of Banks *A.* and *B.* upon the terms that if the negotiations were successful he should be paid a commission. An amalgamation was accordingly effected, upon which the manager, chairman, and vice-chairman of Bank *B.* became directors of Bank *A.* After they had become such directors, *L.*'s commission was paid by the manager of Bank *B.* out of its assets; and part of such commission was handed over by *L.* to, or applied for the benefit of, the manager, chairman, and vice-chairman of Bank *B.* in pursuance of an agreement to that effect previously made between them. A suit was instituted by Bank *A.* against the manager, chairman, and vice-chairman of Bank *B.* and the other directors of Bank *A.* for the purpose of recovering the amount of the commission:—

Held, that the manager, chairman, and vice-chairman of Bank *B.* were liable to make good the sums received by them or applied for their benefit, subject to deduction therefrom in the case of the manager of the amount of compensation properly payable to him in respect of his loss of office; and that the other directors of Bank *A.* having been ignorant of the manner in which the commission was applied, and having acted for the benefit of the company, were not liable to make good anything; but having concealed from the shareholders the fact that a commission had been paid, they were disallowed their costs.

THIS was a suit instituted by the liquidator of the *General Exchange Bank, Limited*, in the name of the bank, for the purpose of obtaining repayment from the Defendants of various sums of money forming part of the assets of the bank, and alleged to have been improperly paid or received by them.

In August, 1864, a company, which had previously existed and carried on business nominally as a friendly society, but which was in reality a banking company, was registered under the *Companies Act*, 1862, by the name of the *Estates Bank, Limited*, and commenced publicly to carry on the business of banking. The capital consisted of £500,000 divided into 50,000 shares of £10 each. In 1865, when the transactions which gave rise to the suit took place, the Defendant *Horner* was the manager of this bank, the Defendant *Hattersley* was the chairman, and the Defendant *Caudwell* vice-

chairman of the board of directors; and there were six other directors who were not made parties to the suit.

In March, 1865, the *General Exchange Bank, Limited*, was formed and registered under the *Companies Act*, 1862, and its objects, as defined by the memorandum of association, were similar to those of the *Estates Bank*. The capital consisted of £1,000,000, divided into 20,000 shares of £50 each. By the 98th of the articles of association, the directors of the *Exchange Bank* were empowered, without further power or authority from the shareholders, to do, amongst others, the things specified in the following passage:—"They may, upon such terms as they think fit, amalgamate with, or purchase, or acquire, the business or property of any company, partnership, or person, carrying on any business included among the objects of this company, as specified in the memorandum of association."

In 1865, one *John Orrell Lever*, acting, as he deposed, at the instigation of the solicitor and stockbroker of the *Exchange Bank*, undertook to promote the amalgamation of the *Exchange Bank* with some existing bank, upon the terms of being paid a commission for so doing. In order to carry out this object he made himself acquainted with the affairs of the *Estates Bank*, to which (so far as appeared) he had previously been a total stranger; and in July, 1865, he called at the *Estates Bank* and introduced himself to the Defendant *Horner*, and laid before him the advantages which would arise from an amalgamation of the *Estates Bank* with an existing bank which he did not name, but whose affairs he described in general terms. Mr. *Horner* expressed himself as unfavourable to such a transaction, but consented to lay it before the directors; and after several meetings between the directors, *Horner* and *Lever*, the directors expressed themselves willing to entertain the proposed arrangement upon "equitable terms;" such terms, in the opinion of the Court, relating presumably to the compensation to be paid to the directors for their consent to the transaction. This compensation, it ultimately appeared, was to consist in the payment or application in manner hereafter mentioned of £6000 to or for the benefit of *Horner*, £1000 to or for *Hattersley*, £1000 to or for *Caudwell*, and £200 to each of the six other directors of the *Estates Bank*.

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Having thus obtained the consent of the directors of the *Estates Bank*, *Lever* next proceeded to deal with the directors of the *Exchange Bank*, whom he induced to enter into negotiations with the *Estates Bank*, and to promise to himself a commission of 5 per cent. on the subscribed capital of the *Estates Bank*, in the event of such negotiations being brought to a successful termination. Ultimately, on the 9th of August, 1865, an agreement was entered into between the two banks (subject to confirmation by the shareholders of the *Estates Bank*), and was in the following terms:—

"1. That the goodwill of the business, the assets and liabilities of the *Estates Bank, Limited*, be transferred to the *General Exchange Bank, Limited*.

"2. That the £10 shares of the *Estates Bank, Limited*, shall be exchanged for £50 shares of the *General Exchange Bank, Limited*, in the proportion of one of the latter to five of the former.

"3. That the shareholders of the *Estates Bank, Limited*, shall be credited in the books of the *General Exchange Bank, Limited*, with the amount of paid-up capital now credited in the books of the *Estates Bank, Limited*, as being paid up on their respective shares, each share of the *General Exchange Bank, Limited*, issued for five shares of the *Estates Bank, Limited*, being credited with the same amount paid up thereon as is paid upon the five shares in respect of which such one share is given; and that the directors of the two banks appoint one person to value the assets of the *Estates Bank, Limited*, which two persons shall at once, and before proceeding to business, choose an umpire, whose decision shall be final, and the report of such two valuers or their umpire shall be conclusive of the value of the assets of the *Estates Bank, Limited*, and shall be made within two months of the date of the confirmation of this agreement, and if the sum total of the assets exceeds the amount now stated by the directors of the *Estates Bank, Limited*, then the proprietors of the *Estates Bank, Limited*, shall be entitled to be credited in the books of the *General Exchange Bank, Limited*, with the amount in proportion to the amount paid upon their respective shares, but should there be any deficiency the amount shall be deducted therefrom:

"4. That the clerks and officers of the *Estates Bank, Limited*, of

which a list has been furnished, shall be retained by the *General Exchange Bank, Limited.*

"5. That the proprietors of the *Estates Bank, Limited,* shall be entitled to an allotment at par in the next issue of new shares of the *General Exchange Bank, Limited.*

"6. That Messrs. *Hattersley, Caudwell,* and *Horner* be elected directors of the *General Exchange Bank, Limited,* and take their seats at the meeting next following the confirmation of this agreement by the proprietors of the *Estates Bank, Limited.*

"7. That within thirty days of the date of this agreement the necessary general meeting of the *Estates Bank, Limited,* shall be called to confirm the above agreement, and upon the same being confirmed at such meeting this agreement shall be a valid and binding one upon both companies.

"8. That all disputes in respect of this agreement be referred to the arbitration of two arbitrators, subject to the provisions of the *Common Law Procedure Act,* 1854."

On the same day, the Defendant *J. A. Roebuck,* who was the chairman of the *Exchange Bank,* wrote and sent to the Defendant *Horner* the following letter:—

"Sir,—In the event of the agreement for the transfer of the assets, &c., from the *Estates Bank, Limited,* to the *General Exchange Bank, Limited,* being confirmed by the shareholders of the *Estates Bank, Limited,* we, the directors of the *General Exchange Bank, Limited,* hereby authorize you to pay out of such assets to yourself and others, for compensation for loss of office, and including commission chargeable for negotiating the transfer, the sum of 5 per cent. upon the capital subscribed for by the shareholders of the *Estates Bank, Limited.* The above charge of 5 per cent. is to be paid and accepted in full satisfaction for such commission and compensation for loss of office. The payment of the aforesaid 5 per cent. to be made and accepted as follows: say five-sixths of the amount in the securities now in the possession of the *Estates Bank, Limited,* or in paid-up shares of the *General Exchange Bank, Limited,* and one-sixth in cash, and payable upon the confirmation of the agreement by the shareholders of the *Estates Bank.*"

The agreement between the two companies was carried into

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effect, and a large majority of the shareholders of the *Estates Bank* became shareholders in the *Exchange Bank*, upon the terms mentioned in the agreement, and in August, 1865 (the precise date did not appear), *Horner*, *Hattersley*, and *Caudwell* became directors of the *Exchange Bank*. The directors of the *Exchange Bank* were remunerated for their services on somewhat higher terms than those of the *Estates Bank*; so that in this respect *Hattersley* and *Caudwell* suffered nothing by the transaction.

On the 17th of October, 1865, a meeting of a committee of the directors of the *Exchange Bank* took place, at which *Horner* and *Lever* were present, and the following resolution was passed, "That Mr. *Lever* having agreed to take the commission of 5 per cent., to be paid to him under the letter of the 9th of August, on the sum of £280,000, that Mr. *Horner* be authorized to settle with Mr. *Lever* on that basis, Mr. *Lever* and the parties interested giving a receipt in full."

On the same day *Horner* had written to *Roebuck* a letter, which was as follows:—

"I beg to inform you that I have received the following from Mr. *Lever*, dated to day:

"'Provided I receive a commission of 5 per cent. upon £280,000 to-morrow, I will give you a receipt in full of all demands under the letter of the 9th of August, 1865.'"

On the next day the *Exchange Bank* paid to *Lever* the sum of £2000 (making, with other sums previously paid to him, £14,000), and received from him a receipt in full of all demands under the letter. When or how the other sums were paid to him did not appear, except that the payments began on the 23rd of August, 1865, and were, in the opinion of the Court, made by *Horner*, after he became a director of the *Exchange Bank*, out of the assets of the *Estates Bank*. The actual subscribed capital of the *Estates Bank* was £289,000, and consequently the balance due to *Lever* under the letter of the 9th of August, 1865, was £2450, but he, as mentioned in the letter of the 17th of October, 1865, consented to accept £2000 in lieu thereof. Out of the £14,000 so paid to *Lever* £200 was paid to each of the six directors of the *Estates Bank* who did not become directors of the *Exchange Bank*. A sum of £1000, further part of the £14,000, was applied for the

benefit of *Caudwell* in the following manner. *Caudwell* was the holder of 100 £10 shares in the *Estates Bank*, on which he had paid calls amounting to £250. Out of the £1000 the sum of £750 was carried to the credit of his share account with the *Estates Bank;* and by this means he became the registered owner of 100 fully paid-up shares in the *Estates Bank*, which were then exchanged for twenty fully paid-up £50 shares in the *Exchange Bank*, under the agreement of the 9th of August, 1865. The balance of the £1000 was paid to *Caudwell* in cash. A similar arrangement was made with respect to *Hattersley*. That made with *Horner* was more complicated. In the first place, a sum of £1000 was applied in a manner similar to that already mentioned in procuring for him twenty fully paid-up shares in the *Exchange Bank*, and a further sum of £5000 was paid either to him personally or to other persons at his request. The residue of the £14,000 was retained by *Lever*.

Of the details of the application of this sum of £14,000 the directors of the *Exchange Bank* were ignorant, and, in the opinion of the Court, intentionally ignorant.

On the 28th of February, 1866, a meeting of the shareholders of the two companies was held, and a balance sheet produced, in which an item of £12,000 was entered as having been paid by the *Exchange Bank* for the goodwill of the *Estates Bank*. No such sum was in fact paid, and the item represented part of the £14,000 paid to *Lever*. The fact of such payment having been made to him was not brought before the meeting, nor otherwise disclosed to the shareholders.

Subsequently, in the same year, resolutions were passed for winding up the *Exchange Bank* under the supervision of the Court, and the liquidator having in the course of the winding-up discovered the facts relating to the payment and application of the £14,000, filed this bill against *Horner*, *Hattersley*, *Caudwell*, and the directors of the *Exchange Bank*, praying that the directors of the *Exchange Bank* might be declared jointly and severally liable to make good to the company the said sum of £14,000, or such part thereof the payment whereof might have been improperly authorized by them, and might be decreed to repay the same accordingly, with interest, after deducting such sums as might be repaid by *Horner*, *Hattersley*,

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and *Caudwell;* that an account might be taken of the moneys and assets of the company which had been received or appropriated either directly or indirectly by *Horner, Hattersley,* and *Caudwell* respectively in respect of the said sum of £14,000; and that they might be ordered to reimburse and pay to the company what they should be found to have received, with interest.

Horner, by a passage in his answer, which is set out at full length in the judgment, alleged that *Lever,* during the progress of the negotiation which resulted in the arrangement of August, 1865, held out to him the hope that upon the transfer of the business of the *Estates Bank* to the *Exchange Bank* he could be appointed manager of the latter, and that, in reliance on this, he abstained from putting forward any claim for compensation for loss of office as *London* manager of the *Estates Bank;* but upon the transfer being effected the directors of the *Exchange Bank* were unable or unwilling to remove their *London* manager, and thereupon *Lever* considered himself bound to make, and did make, to *Horner* payments of various sums amounting to £5000 as compensation for such loss of office.

Lever had become bankrupt before the filing of the bill.

Mr. *Roxburgh,* Q.C., and *Lindley,* for the Plaintiffs :—

As regards *Horner, Hattersley,* and *Caudwell,* the case is clear. They received the money paid to them by *Lever* after they became directors, and have made a profit out of their office, for which they are bound to account.

The directors of the *Exchange Bank* justify themselves under the 98th clause of the articles of the association. But granting that this clause empowered the directors to acquire such a business as that of the *Estates Bank,* we say that the power has been improperly exercised. They agree to pay a commission of 5 per cent. on the subscribed capital, without even inquiring what was the value of the assets, or whether such a payment was beneficial or not.

[They referred to *Land Credit Company of Ireland* v. *Lord Fermoy* (1), and *York and North Midland Railway Company* v. *Hudson* (2).]

Mr. *Jessel,* Q.C., and Mr. *Caldecott,* for six of the directors of the

(1) Law Rep. 8 Eq. 7. (2) 16 Beav. 485.

Exchange Bank, and Sir *R. Baggallay*, Q.C., and Mr. *Cracknall*, for the executors of Mr. *Redman*, a seventh director, who had died since putting in his answer, were called upon as to the question of costs only :—

The directors acted *bonâ fide* for the benefit of the company. They were entirely ignorant of the mode in which the money was applied by *Lever*, and they ought not to have been made parties to the suit: *Overend, Gurney, & Co.* v. *Gurney* (1).

Mr. *Southgate*, Q.C., and Mr. *Rotch*, for *Horner*, *Hattersley*, and *Caudwell* :—

It may be that we should be liable in a suit by the *Estates Bank*, but we are not liable in a suit by the *Exchange Bank*. The *Exchange Bank* contracted to receive the assets of the *Estates Bank* less 5 per cent. on the subscribed capital, and they have received the assets less that amount, therefore in that respect the Plaintiffs have nothing to complain of. Again, there was no fiduciary relationship subsisting between the *Exchange Bank* and these Defendants at the time when the contract for sale was entered into.

Mr. *Roxburgh*, in reply.

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Jan. 15. LORD ROMILLY, M.R., after stating the facts, continued :—

With respect to the directors of the *Exchange Bank* I stopped counsel upon the subject of their liability. I am of opinion that they are not liable to repay anything. They received nothing, and I have no reason to doubt that they acted in the manner they thought best for the interests of the *Exchange Bank*. They knew probably, as every one who is not a child must have known, that the directors of the *Estates Bank* would not have consented to the union unless it had been made for their interest to consent to it; but how or in what manner that consent was obtained they did not think fit to inquire. That the £14,000 was not all to go into

(1) Law Rep. 4 Ch. 701.

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Mr. *Lever's* pocket is abundantly shewn to have been known to everybody; and it is an idle attempt to give a favourable colour to a very palpable transaction, when Mr. *Lever*, in his evidence, says: "None of the Defendants *Roebuck*, *Falconer*, *Honck*, *Redman*, *Suart*, *Thompson*, and *Tombs*, were parties to the settling of the amount that I considered myself justified in paying as compensation to the said *J. A. Horner* for the loss of his office as manager of the said *Estates Bank*, to the said *Thomas Hattersley* and *Job Caudwell* as the founders thereof, and to the other retiring officers thereof; and I arranged and paid the amount of such compensation without reference to or consulting the said Defendants thereon." It would seem from this and from other passages that he and also the other Defendants wish it to appear that this gratuity was mere bounty on his part, and not a matter of bargain and sale between him and *Horner*, *Caudwell*, and *Hattersley*. But the real nature of the transaction appears from a passage in the answer of *Horner*, which I am about to quote.

The case as regards Mr. *Caudwell*, Mr. *Hattersley*, and Mr. *Horner*, appears to me to be very different from that of the other directors of the *Exchange Bank*, and the case of Mr. *Horner* differs also from that of the other two, and I shall consider them first. Their duty as chairman and vice-chairman of the *Estates Bank* was to take care of the interests of their shareholders, and the acceptance of a sum of money, £250 in one case, and £159 in the other case, besides twenty paid-up shares in the *Exchange Bank*, was a distinct pecuniary benefit which they were not justified in taking unless with the sanction and by the consent of their *cestuis que trust*, the shareholders of the company. If the shareholders thought fit to give them the money, it would be well and good; but the whole matter should have been fully revealed and expressed in distinct terms before they could be called upon to consent to, and be embarked in, the transfer. The case of Mr. *Horner* is the same in this respect, that though he was not a director of the *Estates Bank*, he was a manager, bound to consult the shareholders' interests solely, and he cannot, in my opinion, retain to himself a pecuniary benefit obtained by him in his character of manager not known to, and not sanctioned by, the shareholders who employed him. He endeavours to justify it in this manner: "I say that in the progress of the

negotiation by the said *John Orrell Lever* of the said contract he had held out to me that on the occasion of the said transfer he should be able to obtain for me the office of *London* manager of the Plaintiff bank, which would compensate me for the loss of the office of *London* manager of the *Estates Bank, Limited*, and of the *United Kingdom Land Company, Limited*—a company in connection with the *Estates Bank, Limited*, and which offices or joint offices were, at the time of the said contract, held by me at a yearly salary of £800"—I understand that to apply to all the offices together—"and the said *John Orrell Lever* represented to me that my yearly salary as *London* manager of the Plaintiff bank would be £1500; and I say that, relying upon such statements of the said *John Orrell Lever*, and believing, as I had reason to do, that he had great influence with the board of directors of the Plaintiff bank, I, at the request of the said *John Orrell Lever*, forbore to put forward any claim for remuneration or compensation for loss of office as *London* manager of the *Estates Bank, Limited;* but upon the said transfer being effected I was informed by the said *John Orrell Lever* that the directors of the Plaintiff bank were unable or unwilling to remove their then *London* manager (to whom compensation for loss of office would have had to be paid) and to place me in that office, but that he, the said *John Orrell Lever* had undertaken, as he considered himself bound to me to do, to make to me a compensation for my loss of office; and the said benefits were accordingly conferred upon me by the said *John Orrell Lever* in consideration of the circumstances hereinbefore in that behalf mentioned. I further say, that when the said *John Orrell Lever* informed me that I could not become the *London* manager of the Plaintiff bank, he said that he had arranged that I might come on to the board of directors of the bank;" and then he submits that Mr. *Lever* was entitled to do that which he did do. This is a passage to which I have already referred as proving that the matter between him and Mr. *Lever* was one of bargain, and not one of a voluntary kind. If he was entitled to any compensation, it was not for him to settle the amount of it. The rest of the transaction, namely, that respecting the £1000 paid for the twenty £50 shares in the *Exchange Bank* to constitute his qualification to become a director, is exactly the same as that

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relating to *Caudwell* and *Hattersley*; and the £5000 paid to him or for his use is utterly disproportionate and exorbitant if represented as a compensation for the loss of his office as manager of the bank as stated by him. None of this, however, was communicated to the shareholders. The fact that he was not a director, and only a paid servant or manager, is no excuse or exculpation of him; and though it is true that these officers are properly accountable to the *Estates Bank*, yet as by this arrangement all the rights and liabilities of the *Estates Bank* were transferred to and merged in those of the *Exchange Bank* they become accountable to the *Exchange Bank*. I am of opinion that, unless the most open and complete disclosure had been made to the shareholders of the company, this transaction could not be allowed to stand. I am of opinion, therefore, that as regards the sums of £1000 paid to *Hattersley* and *Caudwell*, and the money paid to *Horner*, they are liable to replace the amount of which they got the benefit, subject to this, that as regards the office of Mr. *Horner* a reference must be made to ascertain what was a proper sum to be paid to him by way of compensation for the loss of his office as manager of the *Estates Bank*, having regard to all the circumstances of the case, and that a decree must be made accordingly with costs.

I should certainly have given the directors of the *Exchange Bank* their costs if they had set forth to the meeting of February, 1866, what they knew of the terms of the consolidation of the two companies, namely, that £14,000, being 5 per cent. on the subscribed capital, had been paid to Mr. *Lever* for effecting the transfer; but as this was concealed, I think I cannot give them their costs, though they will not be called upon to pay any, or, indeed, to pay anything whatever.

Sir *R. Baggallay*:—Mr. *Redman*, for whose executors I appear, had retired from the directorship of the company before the meeting in February, 1866.

LORD ROMILLY, M.R.:—Then your clients must have their costs.

Solicitors: Messrs. *Lawrance, Plews, Boyer, & Baker*; Mr. *W. Lane*; Mr. *Edmands*.

In re BAYLEY'S SETTLEMENT.

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Settlement—Construction—"Younger Sons"—Vesting—Class, when ascertained.

By a marriage settlement the real estate of the husband was settled (subject to a life interest in the husband) on the first and other sons of the marriage successively in tail male; and, by a separate deed in which the settlement of the husband's estate was recited, the real estate of the wife was settled (subject to a life interest in her) to the use of all and every the son and sons (other than an eldest or only son) and daughter and daughters of the marriage in equal shares as tenants in common in tail; and it was provided that if any such son or daughter should die and there should be failure of issue of his or her body, or in case any such younger son or sons should become an eldest or only son before he or they should attain the age of twenty-one years, then the share of such son or daughter, as well original as accruing, should go to the survivor, or survivors, or others of the younger sons or daughters (if more than one) in equal shares, as tenants in common in tail; and if there should be only one such son or daughter, to him or her in tail:—

Held, that a younger son who, after attaining twenty-one, became in the lifetime of his mother an eldest son, was not entitled to a share of the wife's estate.

Affd by L. JJ. 6 Ch. 592.

UPON the marriage of *James Bayley* the younger and *Elizabeth Franklin*, in 1812, two settlements of real estate were executed: one of real estate belonging to the husband, the other of real estate belonging to the wife; and both were dated the same day, the 22nd of August, 1812. By the former settlement the husband's estate was conveyed and assured, subject to life interests in himself and his father, to certain uses for securing to *Elizabeth Franklin* a jointure rent-charge of £300 per annum, and subject thereto to the use of the first and other sons of *James Bayley* and *Elizabeth Franklin* successively, and in remainder one after another according to priority of birth in tail male, with divers remainders over. By the latter settlement (which contained a recital of the former) the wife's real estate was conveyed and assured to the use of trustees for a term of ninety-nine years upon trust to secure an annuity to *Elizabeth Franklin*, and subject thereto to the use of *James Bayley* during the joint lives of himself and *Elizabeth Franklin*; with remainder, in the event (which happened) of *Elizabeth Franklin* surviving *James Bayley*, to trustees upon trust to preserve contingent remainders, and also in trust to pay the rents and profits to *Elizabeth Franklin*

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during her life; with remainder over in the following words: "to the use of all and every the son and sons (other than and except an eldest or only son) and daughter and daughters of the body of the said *James Bayley* the younger on the body of the said *Elizabeth Franklin* to be begotten, in equal shares as tenants in common, if more than one, and to the heirs of their respective bodies issuing; and if any one or more such younger son or sons, daughter or daughters shall depart this life, and there shall be failure of issue of his, her or their body or respective bodies, or in case any such younger son or sons shall become an eldest or only son before he or they shall attain the age of twenty-one years, then as well as to the original share or shares of such younger son or sons, daughter or daughters, who shall so die, and whose issue shall so fail, and of such younger son or sons so becoming an eldest or only son as aforesaid, as to the share or shares which shall survive or accrue to any such younger son or sons, daughter or daughters, or to their or any of their issue by the decease or failure of any other the said younger son or sons, daughter or daughters, or by any other younger son or sons becoming an eldest or only son before he or they shall attain the age of twenty-one years, to the use of the survivors or survivor, or others or other of the said younger son or sons, daughter or daughters, to be divided between or among them if more than one, as tenants in common, and to the heirs of their respective bodies issuing. And if all such younger son or sons, daughter or daughters save one, shall die without issue, or in case any such younger son or sons save one shall become an eldest or only son, or if there shall be but one such younger son or daughter, then as to the entirety of the said hereditaments and premises, to the use of such remaining, or such one or only younger son, or such only daughter, and the heirs of his or her body issuing; and in case there shall be no younger son or daughter of the said *James Bayley* the younger, on the body of the said *Elizabeth Franklin* begotten, or being such, they and every of them shall depart this life, and there shall be failure of issue of their respective bodies, then, and in default of such issue, to the use of the only or eldest son and child of the said *James Bayley* the younger, by the said *Elizabeth Franklin*, and the heirs of his body issuing;" with divers remainders over.

The latter settlement contained a power of sale, under which part of the settled property was sold, and the purchase-money paid into Court by the trustees of the settlement under the *Trustee Relief Act.*

James Bayley died in 1842, having had issue six sons and four daughters, of whom three sons (viz., the second, fourth, and sixth sons of the marriage) and two daughters died infants and unmarried. Upon the death of his father, the eldest son entered into possession of the husband's estate, and died in January, 1859, without having been married and without having barred the estate tail. The next eldest son who attained twenty-one (viz., the third son of the marriage) had died in 1855 without having been married and without having executed a disentailing deed; and consequently the estate devolved upon the fifth son of the marriage, who had attained twenty-one and died in March, 1859, without having barred his estate tail, leaving an infant son, the present tenant in tail of the husband's estate.

Elizabeth Bayley, the wife of *James Bayley*, died on the 3rd of September, 1867; and this was a Petition by the two surviving daughters, who had attained twenty-one, for payment of the fund in Court to them.

Mr. *Jessel*, Q.C. (Mr. *Wickens* with him), for the Petitioners:—

In this case a share of the fund is claimed for the infant tenant in tail of the husband's estate, on the ground that his father was a younger son of the marriage. But it is now settled that where a provision is made for younger children, the period for ascertaining the class who are to share in this provision is the period of distribution; and that by the term "younger son" is to be understood a younger son not taking the settled estate: *Lord Teynham* v. *Webb* (1); *Chadwick* v. *Dolman* (2); *Ellison* v. *Thomas* (3); *Collingwood* v. *Stanhope* (4).

These principles will not be disputed on the other side, but it will be contended that they do not apply to the present case, inasmuch as there is a gift over to take effect on a younger son becoming an eldest or only son before attaining the age of twenty-

(1) 2 Ves. Sen. 198.
(2) 2 Vern. 528.
(3) 1 D. J. & S. 18.
(4) Law Rep. 4 H. L. 43.

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one years. In that gift over, however, the words "younger son" mean younger son at the period of distribution, and the gift over operates to divest the estate tail which becomes vested in such a younger son at the period of distribution, in the event of his becoming an eldest son before attaining twenty-one.

Sir *R. Baggallay*, Q.C., and Mr. *Charles Hall*, for the infant tenant in tail of the husband's estate:—

We admit that in general the class of persons to take under the description of younger children is to be ascertained at the period of distribution; but, in the first place, here a contrary intention is to be found in the settlement. The case in this respect is governed by that of *Windham* v. *Graham* (1). The settlement gives over the share of a younger son, only if he becomes an eldest son before attaining twenty-one; that clearly shews that the shares were to vest at birth; and if so, they can only be divested in the exact event provided for by the settlement, which, in the case of this infant, has not happened.

Further, the Court is here construing a settlement of real estate with legal limitations; and it has never been held that the rule adopted by Courts of Equity as to the interpretation of the words "younger son" can be applied to a settlement with legal limitations. The only case in which a legal instrument has been so construed is *Heneage* v. *Hunloke* (2); but there articles of settlement were executed on the same day with the deed, and the Court held that the deed must be construed by the light of the articles.

Mr. *Ince*, for the trustees.

Mr. *Jessel*, in reply:—

In *Windham* v. *Graham* there were two funds provided for younger children, one of £6000, the other of £4000; there was no doubt that the £6000 was to vest in the younger children at twenty-one, and the Master of the Rolls read the settlement by the light of that gift, and held that the £4000 was also to vest at that age. As to *Heneage* v. *Hunloke*, it is a very old case decided on peculiar grounds before the rule that deeds are to be construed in the same way at law and in equity was firmly established.

(1) 1 Russ. 331. (2) 2 Atk. 456.

I contend that this is a contingent gift to a class of younger children to be ascertained at the death of their mother; and that the gift over applies only to persons who were members of that class, whoever they may be, and throws no light on the question who are the members of the class.

Feb. 28. LORD ROMILLY, M.R., after stating the facts, continued:—

The question is, was the fifth son one of the younger children of the marriage within the meaning of the settlement, and is his infant son consequently entitled to a share of the estate?

It is said that he comes within the class, because the gift is to children other than an eldest or only son, followed by a gift over of the share of a son becoming an eldest or only son before attaining twenty-one, which this son did not do; and it is contended that inasmuch as the deed specifies the only case in which he is to lose his share, he must take it in every other case; and *Windham* v. *Graham* (1) is cited as an authority to that effect. But on considering the case I am of opinion that this argument cannot prevail, and that the fifth son was not one of the younger children within the meaning of the settlement.

The state of the authorities is somewhat singular. This arises from there being a conflict between two classes of cases, viz., those cases which relate to vesting, and those which relate to the period at which a class is to be ascertained. If a gift is made to children which is followed by a gift over in the event of any child dying under twenty-one, there is no doubt that the original gift vests at birth; but here the gift is to younger children, and the cases have determined that the words "younger children" are to be construed with reference to the family estate, and that these words mean children not provided for. I am of opinion that the period of distribution is the time when the class is to be ascertained. That was, in the present case, the death of the mother; and at that time the fifth son was dead, but he had been in possession of the paternal estate for two months, and had left an infant son on

(1) 1 Russ. 331.

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whom that estate had devolved as tenant in tail, and consequently he was provided for, and was not a member of the class.

The cases on this subject are very strong, and although at first sight *Windham* v. *Graham* (1) seems to point the other way, I think the distinction drawn by Mr. *Jessel* is the right one. I repeat that there is always a conflict between the two rules to which I have alluded; and in *Windham* v. *Graham*, Lord *Gifford* held, that, with reference to one sum, that of £6000, there could be no question about the meaning; he then considered that the directions as to what was to be done with the £6000 gave a clue to the intentions of the settlor with respect to the £4000; and he followed the rule as to vesting. It is admitted that a testator can deal with his property as he pleases, and may give such directions with reference to it as he thinks fit, and that these directions will override the rule of law. In fact, it is really a question of intention; and in *Windham* v. *Graham*, Lord *Gifford* held, that the intention was expressed to give vested interests at twenty-one. Here, I think, there is no such intention expressed. The rule of construction is the same with respect to settlements as with respect to wills. There may be some question in the case of executory articles, as in *Heneage* v. *Hunloke* (2), to which I was referred; but here, I think, the ordinary rule prevails; and as the fifth son had ceased to be a member of the class at the period of distribution, he did not take an interest, and the order will be according to the prayer of the petition.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Clarke, Woodcock, & Ryland.*

(1) 1 Russ. 331. (2) 2 Atk. 456.

THOMSON *v.* SIMPSON.

V.-C. S.
1870
Mar. 4.

Bill of Exchange—Foreign Banker—Bankruptcy—Appropriation—Representations.

The Plaintiffs purchased from the *New Orleans Bank* a bill of exchange, drawn on the *Bank of Liverpool*, upon the faith of representations by the *New Orleans Bank* that they had funds in the *Bank of Liverpool*, out of which the bill would be paid at maturity; but soon after the purchase, the *New Orleans Bank* having suspended payment (without any proceedings in bankruptcy), the *Bank of Liverpool* refused to accept or pay the bill, although they had ample funds of the *New Orleans Bank*:—

Held, on a bill filed against both the banks, that the Plaintiffs were entitled to payment out of those funds.

Where money is paid on the faith of a representation that a security for it will be paid out of a particular fund, the party who receives the money and makes the representation will not be permitted to withdraw the fund out of which the promised payment is to be made.

Read by Ch. J. James 5 Ch. 67. 41

THE Plaintiffs carried on business as merchants in co-partnership at *New Orleans*, under the style of *A. Thomson & Co.*

The Defendants were *John Hope Simpson*, the registered public officer of the *Bank of Liverpool*, and the *First National Bank of New Orleans.*

The Plaintiffs' firm being, in April, 1867, in want of remittances to *England*, for the purposes of its partnership business, and having been informed that the *New Orleans Bank* had a considerable amount of specie or other funds in the hands of the *Bank of Liverpool*, against which it desired to draw bills, applied to the *New Orleans Bank* for a bill, to be drawn by it upon the *Bank of Liverpool* against the said specie or other funds, and purchased from the *New Orleans Bank* a bill for £2000, dated the 25th day of April, 1867, and drawn by the *New Orleans Bank* on the *Bank of Liverpool*, and payable at sixty days after sight to the order of *A. Thomson & Co.*

The case made was, that at the date of the drawing of the bill the *New Orleans Bank* had deposited with or transmitted to the *Bank of Liverpool* a considerable sum in specie or other good bills of exchange or other funds, exceeding the amount of the bill, and was duly authorized to draw upon the *Bank of Liverpool*

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for the amount thereof, and by an arrangement between the said banks the amount of the bill was to be payable and paid by the *Bank of Liverpool* out of the funds in its hands so specifically deposited or remitted to the *Bank of Liverpool* by the *New Orleans Bank*, and directed by it, and agreed by the *Bank of Liverpool* to be appropriated for that purpose, and on the purchase of the bill the firm of *A. Thomson & Co.* was, as alleged, assured by *Louis Meig*, the cashier of the *New Orleans Bank*, that funds more than sufficient to meet it were then lying with the *Bank of Liverpool*, and specifically appropriated to that purpose, and the bank contracted through its agent with the Plaintiffs' firm that the Plaintiffs' firm, or other the holders of the bill at its maturity, should be entitled to the benefit of such appropriation, and to have the amount of the bill when it should become payable, paid by the *Bank of Liverpool* out of the funds so deposited or remitted, and directed to be appropriated for payment thereof, and the Plaintiffs' firm purchased the bill, solely on the faith of such representations, and that the holders of the bill should have the benefit of the specific appropriation of the funds so deposited or remitted to meet the same.

The bill so purchased was duly indorsed by the firm of *A. Thomson & Co.* to their bankers—the *London Joint Stock Bank*—in *London*, and forwarded to that bank for presentation to, and acceptance by, the *Bank of Liverpool*, and the bill was in due course presented on behalf of the Plaintiffs for acceptance.

Prior to such presentation the *Bank of Liverpool* had received intelligence that the *New Orleans Bank* had, after the drawing and sale of the bill, suspended payment in May, 1867, and in consequence the *Bank of Liverpool* refused to accept the bill, though it had funds lodged with it, and belonging to the *New Orleans Bank*, more than sufficient to meet the bill, after payment and satisfaction of all sums owing to it from the *New Orleans Bank*, and making provision for all liabilities the *Bank of Liverpool* was under in respect of the *New Orleans Bank*.

The bill was duly presented to the *Bank of Liverpool* for payment at the time when it would have become payable, if it had been accepted, but payment was refused on the ground that none of the funds in the hands of the *Bank of Liverpool* had been spe-

cifically appropriated to the bill. The Plaintiffs prayed for a declaration that they were entitled to have the funds so placed with the *Bank of Liverpool* by the *New Orleans Bank*, and alleged to have been specifically appropriated, paid and applied in discharge and satisfaction of the bill of exchange for £2000, but without prejudice to their right or title to have or receive the balance or surplus of the amount of such bill out of the general estate of the *New Orleans Bank*, and that the funds might be paid and applied accordingly; for an injunction to restrain the *Bank of Liverpool* from paying the said funds to the *New Orleans Bank*, and for consequential relief.

On motion made on the 12th of December, 1867, an injunction in the terms of the prayer for that purpose was granted.

The answer of the Defendant *Simpson*, filed on the 29th of January, 1868, shewed that on the 31st of December, 1867, the *Bank of Liverpool* held a large cash credit balance in favour of the *New Orleans Bank*, subject to legal expenses and to any claims that might arise; and under an order made on the 7th of February, 1868, dissolving the injunction, and dismissing the Defendant *Simpson* from the suit, the sum of £3000, part of the deposited funds in the bill mentioned, was paid into Court to the credit of the cause.

The evidence shewed that the course of dealing between the banks was as follows:—The *New Orleans Bank* constantly remitted bills drawn on divers persons and mercantile firms in the *United Kingdom*, and the continent of *Europe* to the *Bank of Liverpool* for the collection of the proceeds to be placed to the credit of the *New Orleans Bank*. Having thus placed the *Bank of Liverpool* in funds the *New Orleans Bank* drew bills in favour of various persons upon the *Bank of Liverpool*. For some time after the account was commenced the *New Orleans Bank* advised the *Bank of Liverpool* of the bills which had been drawn immediately after drawing the same, and before the same were presented for acceptance. After a time the *New Orleans Bank* ceased to advise bills so drawn. The *Bank of Liverpool* protested against that practice, and in consequence the president of the *New Orleans Bank* signed and sent to the *Bank of Liverpool* a letter dated the 11th of September, 1865, stating "as requested, I again repeat that you have full authority to

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accept or pay our drafts on you with or without advice whenever they come through responsible channels."

After that the *Bank of Liverpool* accepted many of the *New Orleans Bank* drafts, when presented through responsible persons, without being advised that they had been drawn. It was of the essence of the course of dealing between the banks that the *Bank of Liverpool* should not incur any risk of loss on the account. At the date of the drawing of the bill in question the *New Orleans Bank* had deposited with or transmitted to the *Bank of Liverpool* a considerable sum on good bills of exchange and other funds, but not in specie, exceeding the amount of such bill; and the *New Orleans Bank* was duly authorized to draw upon the *Bank of Liverpool* for bills, and therefore for the amount of the bill for £2000; but the *New Orleans Bank* denied that any arrangement existed between the banks by which the amount of the bill was to be payable or paid by the *Bank of Liverpool* out of funds in its hands specifically deposited or remitted to the *Bank of Liverpool* by the *New Orleans Bank*, or out of any funds directed by the *New Orleans Bank*, or agreed by the *Bank of Liverpool* to be appropriated for that purpose. The *New Orleans Bank* disputed the right of the Plaintiffs to be paid the amount due to them in respect of the bill out of the proceeds in the hands of the *Bank of Liverpool*.

The Plaintiff *Thomson* deposed that his partner, *W. J. Bishop*, who negotiated with the *New Orleans Bank*, stated to him that the manager of that bank assured him that the bill was drawn against funds of a much larger amount previously remitted, and that he took the bill upon the faith of that assurance, and that without such assurance he would not have purchased it.

Mr. *Forbes*, the president of the *New Orleans Bank*, in his affidavit, stated: "At the time when I sold the bill to the Plaintiff *Bishop* I assured him that the *Bank of Liverpool* held funds of the *New Orleans Bank* sufficient and applicable to meet the said bill, and appropriated to that purpose; and I and *Louis Meig* assured the Plaintiff that the funds remitted by the *New Orleans Bank* to the *Bank of Liverpool*, and then in its hands were more than sufficient to meet, and were specifically appropriated to meet, the bill; and I, on behalf of the *New Orleans Bank*, agreed with

the Plaintiff *Bishop* that the Plaintiffs' firm, or other the holders of the bill at maturity should be entitled to the benefit of such appropriation, and to have the amount of the bill when payable paid by the *Bank of Liverpool* out of the funds remitted to it by the *New Orleans Bank*, and directed to be applied in payment of the bill; and I believe that the Plaintiff *Bishop*, on behalf of his firm, purchased the bill solely on the faith of the representations so made by me that the holders of the bill should have the benefit of the funds which, in my judgment and belief, were remitted and specifically appropriated to meet the same;" and, on cross-examination, Mr. *Forbes* said: "At the time I sold the bill to the Plaintiff *Bishop* I believed I said to him no more than this, that there was, or would be at the maturity of the bill, a balance at the *Bank of Liverpool* more than sufficient to meet the bill, and that there was no doubt it would be paid, and that the Plaintiff *Bishop* believed it." On re-examination, he said that, after having given the Plaintiff—the purchaser—an assurance that the funds were at the bank, he should have certainly considered the non-payment of the bill a breach of faith; and *Louis Meig* deposed that, in his judgment and belief, the funds supplied by the *New Orleans Bank* to the *Bank of Liverpool* were specifically appropriated to the payment of the bill drawn on that bank, and entitled the holder of such bill to payment out of the funds in the hands of that bank. He meant by that that the funds in general were appropriated for those bills drawn against them, and that he understood the *New Orleans Bank* was drawing against the money it had in the hands of the *Bank of Liverpool*, and he regarded the drawing of the bill as an appropriation of so much of the money.

The cause now came on upon motion for decree.

Mr. *Dickinson*, Q.C., Mr. *Cracknall*, and Mr. *Benjamin*, for the Plaintiffs:—

The result of the evidence comes to this, that the *Bank of Liverpool* was never to be in advance of remittances from the *New Orleans Bank*, and the accounts shew that it never was; it had always funds to meet the bills drawn upon it. A written contract was not requisite in this case. The whole course of proceeding between the banks is sufficient for the purpose of establishing the

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claim of the Plaintiffs, whether it was a particular course of dealing or not. It is clear that the Plaintiff *Bishop*, when he purchased the bill, was told by the president and cashier of the *New Orleans Bank* that there were specific funds in the *Bank of Liverpool* to meet the bill at maturity, and that he bought the bill upon those representations; and the *New Orleans Bank* is estopped from denying those representations. In *Burn* v. *Carvalho* (1) there was an act of bankruptcy after a letter directing the delivery of goods to *C.*, but before the delivery of them, and yet it was held that *C.* had a good title in equity. In *Watson* v. *Duke of Wellington* (2) the Master of the Rolls said that, "in order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund;" and that is the case here; but this is a stronger case than that.

Ex parte Imbert (3) was a case similar in its nature to this, and there it was held that remittances made from a foreign country to meet bills before, but not received till after bankruptcy were specifically appropriated; and this case would be on all fours with that of *Ex parte Carrick* (4), if the *Bank of Liverpool* had accepted the bill when first presented. It was the duty of that bank to accept the bill, and if that had been done the *New Orleans Bank* could not have withdrawn their funds without leaving sufficient to meet the bill. There is no question of "order and disposition" in this case.

A suit or a claim on behalf of the creditors of the *New Orleans Bank* to obtain possession of this fund could be understood, but here no one appears for the creditors or the receiver to ask that the fund should be diverted from the particular purpose of paying the Plaintiffs. The refusal to pay by the *Bank of Liverpool* is not intelligible, and the result of it is, that the Plaintiffs have to ask for a declaration that that shall be done which was promised. In equity it is not necessary to specify a particular appropriation; it is sufficient if the fund be designated; and that is clearly the case here. The appropriation was made at the time when the bill was drawn. The *Bank of Liverpool* had always in hand more than enough to meet the bill. It certainly had enough when the bill

(1) 4 My. & Cr. 690.
(2) 1 Russ & My. 602, 605.
(3) 1 De G. & J. 152.
(4) 2 Ibid. 208.

was drawn. If it be necessary, the case can be put as high as that. What is there wanting to constitute an equitable assignment of funds to meet the bill? Lord *Cottenham*, in *Burn* v. *Carvalho* (1), said: "In equity an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."

[The VICE-CHANCELLOR:—This is a bill of exchange to be paid on a certain day. There may be some difficulty in treating the transaction as an equitable assignment.]

On the day this bill became due the *Bank of Liverpool* had funds more than enough to pay it.

The promises made to the Plaintiffs upon the sale of the bill must be borne in mind, and the evidence shews that the *New Orleans Bank* was dealing with funds which it had already provided. This bill must, according to the decision in *Ex parte Carrick* (2), be considered as having been accepted. *Farley* v. *Turner* (3) was also a case of specific appropriation; and there it was held that the fund belonged to the customer of the bank, and not to the general creditors. *Thayer* v. *Lister* (4) followed the decision in *Ex parte Imbert* (5); and there the Court would not allow the title of assignees to be asserted as against the holders of bills; and on all these authorities the Plaintiffs are entitled to be paid.

Mr. *Fry*, Q.C., and Mr. *Robinson*, for the *New Orleans Bank*:—

If an appropriation has been made, effect will be given to it; but if there has been no appropriation the fund will go amongst the general creditors.

[The VICE-CHANCELLOR:—The question is, whether on the contract between the parties and on the course of dealing, the *New Orleans Bank* can be allowed to withdraw the funds applicable to pay this bill at maturity.]

The case made by the Plaintiffs is twofold: the course of dealing between the parties, resolving itself into a specific appropriation of

(1) 4 My. & Cr. 690, 702.
(2) 2 De G. & J. 208.
(3) 26 L. J. (Ch.) 710.
(4) 30 Ibid. 427.
(5) 1 De G. & J. 152.

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the funds transmitted by the *New Orleans Bank* to the *Bank of Liverpool*, and the representations made to the Plaintiff *Bishop*, that there were funds to meet the bill at maturity.

[The VICE-CHANCELLOR:—What is meant is, that the *New Orleans Bank* ought not to do anything which shall defeat the representations made in reference to the funds transmitted to the *Bank of Liverpool*. The principle is stated by Lord *Cottenham* in the case of *Hammersley* v. *De Biel* (1).]

What is the nature of the Plaintiff's bill? The allegation is, that by virtue of the arrangement between the parties, there was an actual specific appropriation, but the evidence totally negatives that; and next, that there were funds which the *New Orleans Bank* directed should be paid to the Plaintiffs' firm or to the holder of the bill, and that the representations made are binding upon the bank. The meaning which the witnesses attached to "specific appropriation" is nothing more than this, that the bill would be paid out of those funds. There was no communication from the *New Orleans Bank* to the *Bank of Liverpool*, that the bill had been drawn, and there was no acceptance of the bill. The funds, therefore, were in the order and disposition of the remitter. The Plaintiffs had only a strong reason for believing that the *Bank of Liverpool* would accept and pay the bill. There were no representations made to the Plaintiffs which would bind the funds in the hands of the *Bank of Liverpool*. Nothing was said that funds were to be retained till the bill had matured. There is no evidence to substantiate the allegation that the bill was purchased upon the faith of representations; but supposing *Forbes* did make any representations, what authority had he for doing so? The Plaintiffs' case, however, is one of appropriation and not of representations, followed by conduct upon the faith of them. It is not a case of equitable assignment, and on this point *Burn* v. *Carvalho* (2) is conclusive. This case is governed by that of *Williams* v. *Everett* (3). The Plaintiffs having no right to come upon this fund specifically, the bill ought to be dismissed, and the fund ought to be distributed amongst all the creditors.

(1) 12 Cl. & F. 45. (2) 4 My. & Cr. 690.
(3) 14 East, 582.

SIR JOHN STUART, V.C.:—

The case has been argued by reference to certain expressions to be found in the evidence, and treated as one of appropriation or of equitable assignment; but, strictly speaking, it is neither the one nor the other, but a case in which the Plaintiffs purchased this bill of exchange upon representations that there would be a balance in the hands of the *Bank of Liverpool* applicable to the payment of the bill at maturity. Having purchased the bill upon the faith of those representations, they are entitled to prevent the vendors of the bill removing that balance, and thus defeating their obligation to pay the bill. The question is one between the Plaintiffs and the drawer of the bill, to whom they paid the money. There is no question as to the right of any other party, and no question as to any right of the *Bank of Liverpool*, who were mere holders of funds against which the Plaintiffs now assert their rights. Upon the evidence, it seems to me to be clearly established that there were, at the time when the Plaintiffs bought the bill, representations made to them that the balance in the hands of the *Bank of Liverpool* should be applied in payment of the bill. Passing over what Mr. *Forbes* says about appropriation, he says in his affidavit, "I believe that the Plaintiff *Bishop*, on behalf of his firm, purchased the bill solely on the faith of the representations so made by me that the holders of the bill should have the benefit of the funds which, in my judgment and belief, were remitted and specifically appropriated to meet the same;" and on his cross-examination he says, "at the time I sold the bill to the Plaintiff *Bishop* I believe I said to him no more than this: that there was or would be at the maturity of the bill a balance at the *Bank of Liverpool* more than sufficient to meet the bill, and that there was no doubt it would be paid;" and on his re-examination, he added, that "after having given the Plaintiffs—the purchasers—an assurance that the funds were there, he should have certainly considered the non-payment of the bill a breach of faith." Mr. *Forbes* was the agent of the *New Orleans Bank*, and by his representations that bank is bound. The question is, whether in defiance of those representations, and with a view of defeating the Plaintiffs' right, the Court can allow the *New Orleans Bank* to withdraw these funds, so that the Plaintiffs

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shall not be entitled to be paid the amount of this bill. I have already referred to the case of *Hammersley* v. *De Biel* (1). The principle there laid down by Lord *Cottenham* applies to cases of this kind. The principle is this: that a representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will in general be sufficient to entitle him to the assistance of a Court of Equity for the purpose of realizing such representation. Upon that principle, it seems to me, that the Plaintiffs are entitled to relief.

Of the authorities which have been cited, that most applicable is *Ex parte Imbert* (2). Lord Justice *Knight Bruce* there said: "If a borrower says to a lender, 'If you will lend I will place something in a particular situation for your benefit,' and after obtaining the loan does so, can he afterwards remove what he has so placed?" If representations were made to the Plaintiffs that there would be in the hands of the *Bank of Liverpool* money sufficient to meet this bill, and if the Plaintiffs paid their money for the bill upon the faith of those representations, it seems to me that the party who made the representations cannot be permitted to defeat them by withdrawing the funds placed at the bank for the purpose of paying the bill.

Declare that the Plaintiffs are entitled to be paid out of the fund in Court the principal moneys due on the bill with interest at 5 per cent. Tax the Plaintiffs' costs of the suit, and order them to be paid out of the residue of such fund; but if it should not be sufficient, then order the Defendants, the *New Orleans Bank*, to pay the balance of such costs.

Solicitors for the Plaintiffs: Messrs. *Clarke, Son, & Rawlins.*

Solicitors for the *New Orleans Bank:* Messrs. *Sharpe, Parkers, & Pritchard,* agents for Messrs. *Harvey, Jevons, & Ryley, Liverpool.*

(1) 12 Cl. & F. 45.

(2) 1 De G. & J. 152, 159.

SPENCER *v.* WARD.

V.-C. S.
1870
March 28.

Will—Construction—Gift to each of the two Children of A. held to include a third Child—Costs against Residuary Legatee.

Gift of £250 to each of the two children of *S.* He had three children:—*Held*, that the three children were each entitled to £250.

The executors, in ignorance that there were three children, paid the eldest, who was of age, her legacy, and set apart £250 for the second, and also paid all the debts and other legacies, and paid over the residue to the residuary legatee. On a bill by the two younger children against the executors and residuary legatee, the Court declared Plaintiffs entitled, and ordered the legacies and the costs, including those of the executors, to be paid by the residuary legatee.

EDWARD BARLOW, by his will, dated the 24th of December, 1862, having appointed *R. A. Ward* and *W. Morris* executors, gave, with four other legacies of £500 each, the following:—

"I give and bequeath the following legacies—£500 to *George E. Spencer*, £250 to each of his two children."

After satisfaction of the legacies he gave the residue to his widow. He subsequently made a codicil not affecting these legacies, and in other respects confirmed his will. He died on the 29th of May, 1868, and his will was proved by his executors.

It appeared that at the date of the will there were three children of *G. E. Spencer*, a daughter and two sons, born respectively in 1845, 1848, and 1861, of which the testator was aware. The executors, after the testator's death, wrote to the father of the children, asking when his two children were born, and the father in reply sent the dates of the birth of the two elder children, but said nothing about the third. The executors thereupon paid the legacy of £250 to the elder child, who was of age, and all the other legacies, and appropriated a sum of £250 to answer the infant's claim, and, according to the allegations in their answer, in August, 1868, paid the whole of the residue to the testator's widow. On the 3rd of March, 1869, the widow married *Henry Spratley*, and on that occasion a part of the assets were settled. On the 28th of July, 1869, the father applied to the executors for payment of a legacy of £250 to the third child. The executors in reply stated that the only fund in their hands was the sum of £250, which they were willing to pay to the second child on the terms of being indemnified

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against loss in paying either of the legacies. The two younger children thereupon filed this bill against the residuary legatee and her husband, and the executors. The executors, in their answer, stated that they had handed the whole of the residue to the residuary legatee; this was denied by the answer of the residuary legatee.

Mr. *Dickinson*, Q.C., and Mr. *Horsey*, for the Plaintiffs:—

The law is now perfectly well settled that these words, in the state of circumstances that existed, entitle each child to a legacy of the amount specified: *Garvey* v. *Hibbert* (1); *Stebbing* v. *Walkey* (2); *Lee* v. *Pain* (3). The circumstance that the testator knew the number of the children does not prevent the application of the rule, as in *Daniell* v. *Daniell* (4), where the testatrix gave to the three children of her niece £500 each, and it was held that all the children of the niece, who were nine in number, were each entitled to a legacy of £500.

On the second point, the executors are liable to the Plaintiffs, not having paid over all the assets: *Knatchbull* v. *Fearnhead* (5).

Mr. *Hemming*, for the executors:—

The executors have been guilty of no neglect or impropriety in the discharge of their duty. Immediately after the death of the testator they wrote to the father of the infants for information respecting the children, and they received a letter from him stating the two elder children's ages, but never mentioning that there was a third child. The executors thereupon paid all the debts, appropriated two sums of £250 each to answer the two legacies, paid the other legacies, and, as they swear in their answer, paid over the residue to the residuary legatees. It is submitted that, under those circumstances, the decree must be against the residuary legatee and not against the executors, both for payment of the legacy and the costs of the suit.

Mr. *Fischer*, for the residuary legatee:—

This case is distinguished from the authorities cited by this cir-

(1) 19 Ves. 125.
(2) 2 Bro. C. C. 85; 1 Cox, 230.
(3) 4 Hare, 249.
(4) 3 De G. & Sm. 337.
(5) 3 My. & Cr. 122.

cumstance,—that all the legacies, including the gift to the two children, consisted of sums of £500, and it follows that the testator meant only to give £500 to the children of *George E. Spencer*, who, in that construction, would take £500 among the three. The authorities have gone further than reason warrants, and the Court will not extend them; secondly, it is submitted that the proper decree would be, not against the residuary legatee, but against the executors, who had funds unadministered in their hands.

SIR JOHN STUART, V.C.:—

The main question is concluded by the authorities, and I must say, with Lord *Kenyon*, that the authorities must be yielded to and not the reason of them. The question here is the same as in *Garvey* v. *Hibbert* (1). The only distinction appears to be, that these legacies are given among other legacies of £500 each, and it is argued, therefore, that the testator meant only to give £500. It is impossible to treat those legacies of £250 to each child as one legacy of £500. The language is too plain, and the Plaintiffs are each entitled to a legacy of £250.

The only remaining question is between the executors and the residuary legatees. The executors swear that the estate has been fully administered, and that, after satisfying and providing for all the legacies but that of the third child, they paid the whole of the residue to the residuary legatee. The residuary legatee in her answer swears that she only received a part. I cannot assume that the statement of the executors is untrue, nor ought I to allow the Plaintiffs to be embarrassed by questions between the executor and the residuary legatee. There must, therefore, be a declaration that the Plaintiffs are each of them entitled to a legacy of £250.

As to the costs, the Plaintiff must pay the executors' costs, and the residuary legatee must be decreed to pay the legacy of £250 not provided for by the executors, and must pay the Plaintiffs' costs, and also the costs of the executors ordered to be paid by the Plaintiff.

Solicitor for the Plaintiffs: Mr. *G. E. Forster.*
Solicitor for the Executors: Mr. *G. Gammon.*
Solicitor for the Residuary Legatee: Mr. *Samuel Roberts.*

(1) 19 Ves. 125.

V.-C. M.

1870
Jan. 11.

ASHTON *v.* BLACKSHAW.

Bankrupt—Furniture—Order and Disposition—Bills of Sales Act (17 & 18 *Vict. c.* 36).

A married woman gave up to her husband £500, held upon trust for her separate use, upon the understanding that the husband would settle his furniture upon her for her separate use. The husband assigned the furniture to a trustee to hold for the use and benefit of his wife, and the property remained in the joint possession of husband and wife. The assignment was not registered under the *Bills of Sales Act* (17 & 18 Vict. c. 36), and the husband afterwards became bankrupt.

Upon bill filed by the wife to have the assignment reformed so as to create a binding trust for her separate use, and to restrain the assignee from keeping possession of the furniture:—

Held, that independently of the *Bills of Sales Act*, the Plaintiff would have been entitled to have the furniture secured for her separate use; but the assignment operating as a bill of sale came within the Act, and not being registered under the Act, the furniture remained in the order and disposition of the bankrupt, and could not be protected against the assignee. Bill dismissed with costs.

THE Plaintiff, *Annabella Delacourt Ashton*, was married to the Defendant, *Thomas Ashton*, in July, 1862, at which time she was entitled, under the will of her brother, *John Love*, for her separate use, to a sum of £500 Consols, then standing in the joint names of *Daniel Love*, also a brother of the Plaintiff, and the Defendant, *Thomas Ashton*, as trustees for the separate use of the Plaintiff.

In the year 1863 *Thomas Ashton* was desirous of having the said £500 transferred to him, which was accordingly done upon an agreement between the Plaintiff and *Thomas Ashton* and *Daniel Love*, that *Thomas Ashton* would, when so required by the Plaintiff, effectually settle upon her for her separate and absolute use all his household furniture and effects. A portion of the money so advanced to *Thomas Ashton* was expended by him in purchasing the furniture agreed to be so settled, and the rest was laid out in his business.

On the 3rd of April, 1868, *Thomas Ashton*, in pursuance of the before-mentioned agreement, executed in favour of the Defendant a deed which was intended to vest all the household furniture and effects mentioned in the schedule thereto in the Defendant *Frederick Clayton*, as trustee for the Plaintiff for her separate use.

The deed was prepared by an auctioneer, and was to the following effect:—

"Know all men by these presents, that I, *Thomas Ashton*, for and in consideration of the love and affection I bear for my dear wife *Annabella Delacourt Ashton*, have granted and confirmed, and by these presents do give, grant, and confirm, to *Frederick Clayton*, as trustee for and on behalf of the said *Annabella Delacourt Ashton*, all and singular the household goods, furniture, beds, bedding, china, linen, glass, books, pictures, and all and singular other the goods, chattels, and effects mentioned and described in or by the inventory or schedule thereof hereunder written or hereunto annexed; to hold the same personal estate and effects unto the said *Frederick Clayton*, his executors, administrators, and assigns, for her use and benefit. And I, the said *Thomas Ashton*, for myself and my executors and administrators, all and singular the said goods and household stuff unto the said *Frederick Clayton*, his executors, administrators, and assigns, and against all and every other person or persons whatsoever shall and will warrant, and for ever defend by these presents, of which goods and chattels I, the said *Thomas Ashton*, have put the said *Frederick Clayton* in full possession by delivering him one chair in the name of all the goods and chattels at the sealing and delivery thereof. In witness whereof I, the said *Thomas Ashton*, have hereunto set my hand and seal this third day of April one thousand eight hundred and sixty-eight.

"Signed, &c., by *Thomas Ashton*."

This deed was intended to be registered under the *Bills of Sales Act* (17 & 18 Vict. c. 36); but the registration was never completed.

The Plaintiff and her husband had since, with the consent of *F. Clayton*, remained in the enjoyment of the furniture and effects comprised in the schedule until the 18th of December, 1869.

Thomas Ashton was adjudged a bankrupt in October, 1869, and the Defendant *John Blackshaw* was appointed the sole creditors' assignee, and as such he obtained, on the 18th of December, an order from the Court of Bankruptcy for the sale of the furniture and effects comprised in the deed, upon the alleged ground that it was at the date of the bankruptcy in the order and disposi-

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tion of the bankrupt as reputed owner thereof. Under this power the furniture and effects were taken possession of by *John Blackshaw*, who was about to sell the same for the benefit of the creditors.

The bill prayed that the deed of April, 1868, might be reformed for the purpose of creating thereby a binding trust of the furniture and effects for the separate use of the Plaintiff, in accordance with the object and intention with which such deed was executed, and that in the meantime the Defendant *John Blackshaw* might be restrained from selling or holding possession of such furniture and effects. The case came on upon motion for an injunction to restrain the sale of the furniture; but by agreement it was treated as the hearing of the cause.

Mr. *Cotton*, Q.C., and Mr. *Hastings*, for the Plaintiff:—

This property was settled to the separate use of the wife, and there is no doubt upon the evidence that when she and the trustee of the fund consented to give it up to the husband there was an agreement that the furniture, which was in fact purchased with a part of the wife's property, should be settled to her separate use as an equivalent, and in order that she might be secured of a portion at any rate of the money she advanced to her husband. The assignment prepared by the auctioneer was an informal instrument; but the effect of the parol agreement ought to be carried out by vesting the furniture in the trustee for the separate use of the wife. The furniture was the property of the wife, and was in her possession, though in the husband's house at the time of the bankruptcy; therefore it cannot now be taken by the assignees of the husband. There can be no doubt that a wife may have property in furniture separate from her husband, even though it was not hers before marriage. This is shewn by *Simmons* v. *Edwards* (1). There is valuable consideration for this deed, because the wife was giving up what was settled to her separate use. Then, as to the bankruptcy. The case resolves itself into a question how far the furniture, being in the house where the husband and wife resided, was in the order and disposition of the bankrupt. In the case of *Jarman* v. *Woolloton* (2), where a woman before marriage con-

(1) 16 M. & W. 838. (2) 3 T. R. 618.

veyed all her stock in trade and furniture to trustees in order to carry on the business separately, it was held that the furniture was not liable for the husband's debts, though it was removed to his house. When once it is proved that furniture is the wife's separate property, its being in the joint occupation of husband and wife does not place it in the order and disposition of the husband.

[They also cited *Clark* v. *Crownshaw* (1).]

Mr. *Glasse*, Q.C., and Mr. *Haddan*, for the Defendant:—

Our case is that this deed of assignment was intended to operate as a bill of sale, and that as it was not registered as a bill of sale under the provisions of the *Bills of Sales Act* (17 & 18 Vict. c. 36) the furniture was left in the order and disposition of the bankrupt. That Act has said that goods shall remain in the order and disposition of the person in whose possession they are, unless altered by a bill of sale registered in accordance with the 2nd section of the Act, and this assignment or bill of sale has not been registered. An attempt was made to do so, but failed from an informality, but that fact proves that it was the intention of the parties that it should act as a bill of sale. It never was meant to be a settlement to the separate use of the wife, but a bill of sale, nor could there have been a post-nuptial settlement which could have effected the object of the parties without being registered under the Act: *Fowler* v. *Foster* (2). If the furniture had been settled before marriage to the separate use of the wife, then it would not have been in the order and disposition of the husband, because ante-nuptial settlements are excluded from the operation of the Act by the 7th section.

The transaction itself was of a suspicious character. It was in 1863 that the wife's money was advanced to the husband, but it was not till 1868 that this assignment was effected, showing evidently that it was executed in consequence of anticipated bankruptcy by the husband; and even if there had been a valid settlement, it would have been a breach of trust for the trustee to invest the money in furniture, and if the deed is invalid it cannot be reformed by this Court.

(1) 3 B. & Ad. 804.

(2) 5 Jur. (N. S.) 99.

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Mr. *Cotton*, in reply :—

The question is, whether the furniture was in the order and disposition of the bankrupt at the time of the bankruptcy with the consent of the true owner. The *Bills of Sales Act* has nothing to do with this case. The registration of a bill of sale would not take the property out of the order and disposition of the bankrupt, because the trustee was the true owner, and the property was in the husband's possession with the consent of the trustee. *Stansfeld* v. *Cubitt* (1) decides that the Act for the registration of bills of sales does not narrow the application of the doctrine of reputed ownership; and it was held in *Badger* v. *Shaw* (2) that the registration of a bill of sale under the 17 & 18 Vict. c. 36, does not of itself take the goods mentioned in the bill of sale out of the operation of the reputed ownership clause of the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106, s. 125.) A bill of sale has no effect upon order and disposition where there is a settlement of the property which is left still in the occupation of the owner. The assignment was executed and not registered. The non-registration renders the assignment a nullity, and the Plaintiff is thrown back upon the parol agreement for a settlement of the property, and that is sufficient to entitle her to a settlement for her separate use.

Sir R. Malins, V.C.:—

The transaction out of which the question arises is of a very simple description. *Annabella Ashton*, the wife of the Defendant the bankrupt, was, under the will of a brother, entitled to a sum of £500 for her separate use. In the year 1862 she married the bankrupt. In 1863, upon the request of her husband, and under circumstances which were deemed advantageous by all parties, this sum of £500 so left to the trustee was advanced to the husband. It is distinctly sworn, and not attempted to be contradicted, that that advance was made upon a contract by the husband that he would secure to the wife for her separate use (as she had the money before) all the household furniture and property of the husband; but although the money was advanced in the year 1863 it appears that no settlement was executed until the year 1868.

(1) 2 De G. & J. 222. (2) 8 W. R. 210.

But it is sworn to by the wife and by the husband that she very frequently requested the husband to make this settlement; and upon the evidence I must assume it to be proved that the advance of the £500 was made upon a distinct contract that the husband would settle and assure the furniture of which he was the owner for the benefit of the wife for her separate use. This contract was ultimately carried into effect, or attempted to be carried into effect, by a very inartificial instrument prepared by an auctioneer, who was ignorant of the law affecting the separate property of a married woman; but it is an assignment of the household furniture to the trustee *Frederick Clayton* in trust for the wife. The words "separate use" are not used, but the evidence, I think, is perfectly distinct as to what the intention of the parties was, namely, that the property should be secured to the separate use of the wife; and I am very clearly of opinion that if there had been no other objection to the validity of the transaction, the case establishes a right on the part of the wife to have that settlement corrected by introducing these words for her protection, which words were omitted solely from the ignorance of the party preparing the instrument.

Independently of the *Bills of Sales Act*, which has been referred to, I am of opinion that the Plaintiff would have established a case that the property was assigned to her for her separate use, and the instrument being silent upon the subject, she would have been entitled to succeed in having the instrument corrected. As the parties have very reasonably agreed on both sides to treat this motion as the hearing of the cause, I am now enabled to decide all the questions between them.

Then being of opinion that this would have been a contract perfectly valid for the benefit of the wife, independently of the *Registration Act*, the only question is, whether that Act makes a difference? Several cases have been cited in reference to this Act, and, apparently, some of them are rather contradictory, but I think when they are carefully considered there is no real contradiction in them whatever. I apprehend with regard to household furniture, pictures, chattels, heirlooms, and everything in which there is an apparent ownership, the law stood thus: if furniture and effects were assigned by way of security, with a proviso that the assignor should remain in possession until default

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in payment of interest, or for a specified time, say a year, if it turned out that although he was in possession he was in possession only under a deed which gave him a temporary right of occupation, then the possession, being consistent with the deed, apparent ownership and disposition would not apply; but the question would always be, whether the possession was or was not in conformity with the terms of the deed. Suppose a man assigned to a purchaser upon an agreement that he should give up possession at the expiration of a year, it is perfectly clear that the possession would be consistent with the deed during one year; but if he were allowed to remain in possession after a year, then the possession would be inconsistent with the deed, and apparent ownership or order and disposition would apply. But during the year, the possession being consistent with the deed, he is not then to be deemed in possession with the consent of the true owner, and consequently, in case of bankruptcy within the year, the assignees would not be entitled to the property; and that would be the result of *Clark* v. *Crownshaw* (1), which was the case of an execution creditor where the order and disposition clauses did not apply.

That having been the state of the law, this Act recites, that "Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors, for remedy whereof be it enacted,"—then it enacts, that "every bill of sale after the passing of this Act shall be registered within twenty-one days, or if not, it shall be void against the assignees in bankruptcy and insolvency." Now, when the statute says, that if it is not registered it shall be void against the assignees in bankruptcy and insolvency, it clearly implies that it shall not be void against them if it is registered, provided the possession is consistent with the deed.

The law, therefore, I apprehend, is clear that in the case I have put, that household furniture is assigned by way of security with a proviso that the assignor shall remain in possession until default,

(1) 3 B. & Ad. 804.

and before the period when the money is to be paid he becomes bankrupt, then the bill of sale, by being duly registered, as it must be under this Act, gives such a notoriety to the fact of the possession, that against the creditors of the assignor the assignment is protected. But in *Stansfeld* v. *Cubitt* (1), in which Lord Justice *Knight Bruce* and Lord Justice *Turner* stated that there was no alteration of the law with regard to order and disposition, there was no assignment out and out, and no proviso that the assignors should remain in possession for a single day. The consequence was, that the possession and the deed were perfectly inconsistent. The possession implies that the man in possession is owner, and the deed that the assignee is owner. Therefore, when the man has a right to take possession and allows the assignor to remain in possession, he must be considered as in possession with the assent of the true owner. If in such a case as that, under the order and disposition law, bought property remains where it was, it will all depend upon whether the possession is or is not consistent with the deed. Now, in the present case, I have already said that this transaction is one which would have been perfectly valid to protect property against the assignees of the husband but for this Act. What, then, is the policy of this Act? It is perfectly clear, from *Stansfeld* v. *Cubitt*, and perfectly clear upon principle, that the policy is, that there must, in every change of ownership of chattels in the possession of the assignor, be a registration if he remains in possession, to prevent his obtaining credit on the faith of the possession being in himself, when in point of fact it is only apparent.

Therefore, as the law now is, you are not necessarily to assume that *A. B.*, being in possession of a well-furnished house, is the owner of that furniture; it may be that he hires it only, or it may be that it was his, and has ceased to be his by assignment. If he is once known to be the owner of the property, then a person is entitled to treat him as still the owner, unless there be some deed registered which shews that the ownership has changed. If, therefore, he sells the property, the purchaser must take possession as soon as circumstances permit; and if, instead of taking possession, he allows the seller to remain in possession, then the property passes to the assignees.

(1) 2 De G. & J. 222.

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Take the case before me. Up to the deed of the 3rd of April, 1868, this bankrupt, *Ashton*, was in possession of this furniture. He was known to be the owner of it. Any person seeing him apparently the owner of the property would be entitled to give credit, unless he received a notice that a change of ownership had taken place. He goes to the proper office, and finds no deed registered. What is the consequence? The creditor says, "I know he was the owner lately, and he was occupier of the furniture; there is no bill of sale registered, and I am entitled to treat him as the owner still." If a purchaser bought the property for a sum of money, and allowed the assignor *Ashton* to remain in possession, then *Ashton* would have been apparent owner, and the property would have passed to the assignees. The real transaction was an assignment for the benefit of the wife; but being an assignment by a person who was apparently the owner, the Act of Parliament provides for such a case. Then what is the protection given by the Act? The 7th section enacts, "That the expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt; but shall not include the following documents"—that is to say, "assignments for the benefit of creditors"—this is not that—"marriage settlements." This is clearly not a marriage settlement. Even if there had been no decision on the subject, I could never have treated this as a marriage settlement; it is a post-nuptial arrangement; a purchase of the property with the wife's separate property for her benefit, substituting furniture for money. In the case of *Fowler* v. *Foster* (1) it was decided that a post-nuptial settlement executed by the assignor for the benefit of his wife and children is not a marriage settlement and not protected by the Act. This, therefore, is clearly not a marriage settlement. Not being a marriage settlement, it is a bill of sale; but it is a bill of sale to a trustee for the benefit of the wife. But then the Act of Parliament says, "every bill of sale," that is, every instrument by which ownership is changed from one person to another, that person remaining in possession, unless it is regis-

(1) 5 Jur. (N. S.) 99.

tered within this Act, is void as against the assignees in bankruptcy and insolvency. Therefore, putting the wife in the highest position that I can put her, as the purchaser of this property for value, a purchaser for her own separate use, and providing that although the possession was to remain in the husband the ownership was to be in her, or her trustee for her, which is the same thing, this is a case in which the possession was consistent with the deed before this Act of Parliament without registration, but which under this Act of Parliament cannot be protected unless in the mode prescribed by the Act; and on that ground, therefore, I am of opinion, that where it is for the benefit of the wife or child, if there be any attempt to change the ownership by a bill of sale there must be a registration, or there is no change of ownership, and the property remains in the apparent owner. This property, I am of opinion, did remain in the order and disposition of the bankrupt, and consequently the bill fails and must be dismissed; and I do not see any ground upon which I can do otherwise than dismiss it with costs.

Solicitors for the Plaintiff: Messrs. *Harper, Broad, & Manly.*
Solicitors for the Defendant: Messrs. *Weeks & Son.*

COUTTS *v.* ACWORTH.

Election—Revocation in excess of Power.

A lady on her marriage appointed by deed-poll £3000 to trustees, the interest to be paid to her husband for life, and after his decease, the capital to be divided between her nephews and nieces; and the deed contained a power to revoke the trusts subsequent to the life estate. By her will, after marriage, she revoked all the trusts of the deed, and gave £1000 to her husband and £2000 to the Plaintiff:—

Held, that the testatrix having revoked all the trusts of the deed while the power only extended to the remainder, the husband was put to his election.

MERCY HARVEY, by a deed-poll dated the 8th of April, 1861, made in anticipation of her marriage with *James Brenchley*, executed a power of appointment given her by the will of her father, *W. Edmunds*, over a sum of £3000, and thereby directed and

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appointed that the trustees of the will should stand possessed of the said £3000 after her decease, upon trust, to pay the income thereof unto *J. Brenchley* for life, and after the decease of herself and the said *J. Brenchley*, upon trust to pay and divide the said sum of £3000 unto and equally between her nephews and nieces, the Defendants *Joseph Acworth*, *James Acworth*, and *Sarah Plumer*, as tenants in common. And by the said deed it was declared that it should be lawful for *Mercy Harvey* at any time thereafter, notwithstanding her intended marriage, and whether covert or sole, by deed or will, to revoke, determine, and make void the trusts thereinbefore directed, appointed, declared, and contained, in favour of the said *Joseph Acworth*, *James Acworth*, and *Sarah Plumer*, or any part or parts thereof.

After her marriage with *James Brenchley*, *Mercy Harvey* (then *Brenchley*), made her will dated the 24th of February, 1862, in these terms: "And whereas by a deed-poll dated the 8th of April, 1861, made by virtue of the power given me by the will of *William Edmunds*, I exercised the power of appointment over the sum of £3000 in favour of certain persons as is therein more particularly set forth. And in the said deed was contained a proviso that it should be lawful for me at any time or times thereafter, notwithstanding my then intended coverture, and, whether covert or sole, by any deed or deeds to be sealed and delivered by me in the presence of two or more credible witnesses, or by my last will and testament, or any codicil or codicils thereto, to revoke, determine, and make void the trusts thereinbefore directed. Now I, the said *Mercy Brenchley*, by force and virtue of the power reserved to me by the said deed of April, 1861, do hereby revoke, determine, and make void the trusts declared and contained in such deed, and by virtue of the power contained in the will of the said *J. Edmunds*, I do hereby direct and appoint that the said sum of £3000 so bequeathed by the will of *W. Edmunds*, and the stocks, funds, and securities upon which the same is or shall be invested, and the interest, dividends, and produce thereof, after my decease, shall be held as to £1000 part thereof upon trust for my husband, *James Russell Brenchley*, and in the event of his decease prior to my own for his executors or administrators, and as to £2000, the residue thereof, upon trust for the Rev. *James Coutts*, Baptist minister, and in the

event of his decease prior to my own, for his executors or administrators," and the testatrix appointed the Plaintiff executor of her will.

The bill prayed that it might be declared that the trust fund was well appointed by the will of *Mercy Brenchley*, subject only to the life estate appointed to *J. Brenchley* by the deed of April, 1861, and that *J. Brenchley* was put to his election between such life estate and the £1000 appointed to him absolutely by the will.

The bill also prayed that a deed of appointment executed by *Mercy Brenchley* in 1853, might, under the circumstances therein stated, be delivered up to be cancelled.

The question arising upon that portion of the case is reported (1), the question of election being left for further argument.

Mr. *Glasse*, Q.C., and Mr. *Bagshawe*, for the Plaintiff, *James Coutts* :—

There can be no doubt upon the words of the will of *Mercy Brenchley*, that she was under the impression that she had power under the deed-poll of April, 1861, to revoke the whole of the trusts of that deed, including her husband's life interest, whereas the power only extended to the nephews and nieces who were to take after her husband's death. Under this mistake she gave by her will a sum of £1000 to her husband in lieu of the interest she had given him by the deed-poll, and consequently he must be now put to his election between the life interest and the absolute bequest of the £1000. By the will the trusts of the deed are revoked, and the husband cannot claim under an instrument which revokes another instrument, and under that prior instrument at the same time, for if his claim is good under the will, it must necessarily be bad under the deed, which it purports to revoke.

Mr. *Fooks*, Q.C., and Mr. *Bevir*, for the husband, *J. Brenchley* :—

The husband is not put to his election in this case. The testatrix had no power to revoke the life interest given to her husband, and therefore cannot be taken by the will to have revoked anything more than she had power to revoke. It is not enough that

(1) Law Rep. 8 Eq. 558.

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she laboured under the mistake that she had power to revoke the whole of the trusts. In order to raise a question of election, there must be a clear intention expressed to pass a particular estate on the face of the will: *Dashwood* v. *Peyton* (1). Lord *St. Leonards* on Powers (2). There is no intention expressed by the testatrix in this will to do anything more than she had power to do, that is, to revoke the bequests subsequent to the husband's life estate. The husband is entitled therefore to the life interest under the deed of April, 1861, and to the £1000 bequeathed to him by the will.

SIR R. MALINS, V.C.:—

I think it is impossible to read this lady's will without seeing that she thought she had complete dominion over the £3000. By her marriage settlement she had secured the interest of it to her husband for his life, and after his decease she had given the capital to certain volunteers, relatives. By the marriage settlement she retained to herself a power of revocation, so far as the interest of those volunteers was concerned, but no power of revoking the life interest of her husband. In this state of things she makes her will, and in the clause of revocation it is evident that she meant to revoke all the trusts, and not only the trust as regards volunteers. Then in giving the £1000 to her husband, she does not expressly say "immediately after my decease," but it is as clearly implied as if the word "immediately" had been used, because it is obvious that this was a trust to take place as soon as she herself was dead.

I think it perfectly clear that that will is made upon the assumption—the erroneous assumption—that she had the power of revoking the whole trusts, and I cannot assume that if she had been duly informed that her husband had already irrevocably secured to him a life interest in the whole fund, she would have thought of giving him £1000 in addition to that life interest; she gives it to him because she wished him to have £1000 in satisfaction of all claims upon this fund. And having given £1000 to him she gives the residue of £2000 to Mr. *Coutts*, the Plaintiff. I think, therefore, it is as plain a case of election as was ever

(1) 18 Ves. 27. (2) 8th Ed. p. 579.

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brought before the Court. It clearly falls within the rule, that where a person has a benefit already vested in him, and a benefit is given to him which is inconsistent with that, he must elect between the two. Therefore Mr. *Brenchley*, or those who represent him, must elect between the legacy of £1000 under the will and the life interest under the settlement.

The costs should be borne by each share in proportion. In other words, the taker of each share will bear the proportion of the burthen falling to the share he takes.

Solicitors for the Plaintiff: Messrs. *Learoyd.*
Solicitor for the Defendant: Mr. *Scott Lawson.*

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March 2.

Arbitration—Power to revoke Submission—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125)—*Construction of Agreement of Reference.*

The power to revoke without the leave of a Court a submission to arbitration, which does not contain a consent clause for making the submission a rule of Court, is not affected by the *Common Law Procedure Act*, 1854.

A. and *B.* having dissolved partnership, signed an agreement by which, after stating that *B.* had offered *A.* £18,000 for the purchase of his interest in the partnership business and assets, and that *A.* had declined the offer but was willing to accept £20,000, they agreed to leave it to a referee to say what sum should be paid by *B.* to *A.*:—

Held, that the authority of the arbitrator was restricted to awarding a sum not less than £18,000 nor greater than £20,000; and that the agreement was revocable by either party at any time before the award was made.

8 Ch D. 34
14 Ch D 203

THIS was a motion on behalf of the Plaintiff in a suit for the dissolution of a partnership between the Plaintiff and the Defendants, for an injunction to restrain the Defendants from drawing, accepting, or indorsing bills, or entering into guarantees, or executing securities in the name of the firm, and from receiving the partnership assets, and from carrying on their own business on the partnership premises, and for the appointment of a receiver of the partnership assets.

The Plaintiff and Defendants had been in partnership as merchants and shipbrokers under the firm of *Anderson, Thomson,*

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& Co., at *Billiter Court*, in the City of *London*, from the 1st of January, 1863. There were no written articles, and there was a dispute whether the partnership was for a term of seven years or at will; but in either case it was determined on the 31st of December, 1869.

The bill was filed on the 15th of November, 1869. On the 10th of December negotiations commenced through the medium of a Mr. *Leary* for the settlement of the differences between the parties, and the purchase by the Defendants of the Plaintiff's interest in the partnership and in another firm of *Thomson, Bilbe, & Co.* The books and accounts of the partnership were shewn to Mr. *Leary*, who, on the 22nd of December, told the parties that he thought the Plaintiff ought to receive £21,212; but the Defendants insisted that the outside value of the Plaintiff's interest was about £15,000. On the 24th of December the Defendants offered to purchase the Plaintiff's interest for £18,000; the Plaintiff refused this offer, but offered to take £20,000.

On the 31st of December, 1869, the Defendants took new offices, and issued a circular to the correspondents of the firm announcing the determination of the partnership and their intention to carry on business at the new offices under the firm of *Anderson, Anderson, & Co.*; and on the same day the Plaintiff wrote to the bankers of the firm, requesting them only to honour the collective signatures of the partners.

On the 1st of January, 1870, upon the suggestion of *Leary*, the proposals for a settlement were renewed, and resulted in the Plaintiff and the Defendant, *James Anderson*, on behalf of himself and the other Defendant, signing a memorandum on that day, of which the material parts were as follows:—

"On the 24th of December, 1869, Messrs. *Anderson* offered Mr. *George Thomson*, on the expiration of the partnership of *Anderson, Thomson, & Co.*, and *Thomson, Bilbe, & Co.*, by effluxion of time at the end of the year, the sum of £18,000, for the purchase of the whole of his interests in both the said firms and the assets thereof, and in final settlement of all claims on his part against Messrs. *Anderson*, or either of them. Mr. *Thomson* declined the offer, but is willing to accept £20,000.

"Both parties agree to leave it to Messrs. *Williams, Deacon, &*

Co., as the bankers of the firm, to say what sum shall be paid by Messrs. *Anderson* to Mr. *Thomson*, and to be bound by their decision; and in the event of any question afterwards arising between the parties as to the carrying out of the arrangement, and the documents to be signed or executed for the purpose, the same to be similarly submitted to Messrs. *Williams, Deacon, & Co.*

"In consideration, and as a part of the terms of the above settlement, all pending proceedings to be abandoned, on the terms of each party paying his own costs."

The agreement was prepared by the Defendants' solicitor at *Leary's* office, and there was a conflict of evidence as to the intention of the parties, *Leary* and the Plaintiff asserting that it was agreed that the power of the arbitrator should be limited to awarding a sum not less than £18,000 nor more than £20,000; while the Defendant and his solicitor asserted that the agreement was for an unlimited reference. The parties agreed that the reference should be made to Mr. *Thornton*, one of the firm of *Williams, Deacon, & Co.*, and Mr. *Thornton* undertook the arbitration, and at the request of both parties saw them separately and heard their statements. On the 6th of January, the Plaintiff, having ascertained through *Leary* that *Thornton* considered that under the terms of the agreement there was no limit as to the sum to be awarded, wrote and sent to Messrs. *Williams, Deacon, & Co.*, the following letter:—

"I regret to learn that you entertain any doubt as to the meaning of the words 'what amount' in the memorandum signed by Messrs. *Anderson* and myself under date of the 1st instant, and now beg to state most positively that my signature was given on the clear and express representation to me by Mr. *Leary*, as the result of his conference that morning with Mr. *Rawlins*, that the question for your consideration was narrowed to not less than £18,000 and not exceeding £20,000.

"Without, therefore, waiting to learn your decision, I beg you will be so good as to understand that I cannot, and do not, submit the matter to your consideration, unless narrowed in the way I have indicated; and must therefore revoke my signature on any other terms."

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On the 10th of January, *Thornton*, on behalf of the firm of *Williams, Deacon, & Co.*, made his award, by which he awarded £14,000 as the sum to be paid by the Defendants for the purchase of the Plaintiff's interest in the two firms, and in final settlement of all his claims against them. The award was taken up by the Defendants on the same day.

On the 3rd of January the Defendants, with the consent of the Plaintiff, had issued a circular to their correspondents, to the effect that they hoped in a day or two to be able to announce the formal transfer to them of the business of *Anderson, Thomson, & Co.*, and that their address would thenceforth be at the office of the old firm in *Billiter Court*; and on the same day they gave up their new office and painted up the name of *Anderson, Anderson, & Co.* on the office of the late firm; and from that time they had continued to carry on their business in that office.

On the 14th of January the Plaintiff's solicitor wrote to the Defendants' solicitors repudiating the award; and on the 26th of January notice of this motion was served. The bill had not been amended.

Mr. *Glasse*, Q.C., and Mr. *Rawlinson*, for the Plaintiff:—

The Plaintiff is entitled to an injunction and receiver, unless the award is binding. But the award is bad for two reasons: first, because, before it was made, the submission to arbitration was revoked; secondly, because the arbitrator exceeded his authority.

First: The right of either party to revoke the submission at any time before the award is made, where it does not contain an agreement that it shall be made a rule of Court, is not taken away by the *Common Law Procedure Act*, 1854, (17 & 18 Vict. c. 125). It might have been made a rule of Court by either party under the 17th section, and would then not have been revocable without the leave of the Court; but, not having been made a rule of Court, it was revocable: *Mills* v. *Bayley* (1). The Plaintiff therefore was entitled to revoke the submission, and he did revoke it four days before the award was made.

Secondly: The reference was confined within the limits of £18,000 and £20,000. This is clearly shewn by the terms of the

(1) 2 H. & C. 36; 32 L. J. (Ex.) 179; 11 W. R. 598.

agreement itself, which begins by stating the offer of the Defendants to give £18,000 and the willingness of the Plaintiff to accept £20,000. For what purpose could this statement have been inserted, except for the purpose of defining the limits of the sum to be awarded? The result of the evidence is, that the parties intended the reference to be so limited, or, at all events, that the Plaintiff and *Leary* so understood it. Therefore either the arbitrator has exceeded his authority by awarding less than £18,000, or, if the agreement be construed as an unlimited reference, it is, on the ground of mistake, not binding on the Plaintiff.

Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Hemming*, for the Defendants:—

Even if the agreement of the 1st of January had been simply a submission to arbitration it would have been irrevocable. By the 3 & 4 Will. 4, c. 42, s. 39, every submission containing an agreement that it shall be made a rule of Court is made irrevocable without the leave of the Court. By the 17th section of the *Common Law Procedure Act*, 1854, every submission may be made a rule of Court, unless it contains words to the contrary. The 7th section provides that the proceedings "upon any such arbitration as aforesaid"—that is, any arbitration mentioned in any of the preceding sections, including the 5th, which refers to arbitrations where the submission "is or may be" made a rule of Court—shall, except otherwise directed by the Act or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments as to the power of the arbitrator and of the Court, the attendance of witnesses, the production of documents, enforcing and setting aside the award, and otherwise, as upon a reference made by consent under a rule of Court or Judge's order. The effect of these enactments together is that every submission which does not expressly provide that it shall not be made a rule of Court is irrevocable. In *Drew* v. *Drew* (1) Lord *Cranworth* says: "Now the law may be represented as being that neither party to a submission can stop an arbitration pending its proceedings without first obtaining the sanction of some Court of *Westminster Hall* or of one of the Judges

(1) 2 Macq. 1, 4.

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for so doing." *Mills* v. *Bayley* (1) is the only authority to the contrary, and neither sects. 5 and 7 of the *Common Law Procedure Act*, 1854, nor Lord *Cranworth's dictum* were referred to in that case. Even before the 3 & 4 Will. 4, c. 42, the Court would not assist a party who had capriciously revoked a submission: *Harcourt* v. *Ramsbottom* (2). Further, even if a reference of differences would be revocable, this was not a submission to arbitration of matters in dispute, but a reference to a third party to ascertain the price to be paid by one party to the other for that which one had agreed to buy and the other to sell. Such a reference is not an arbitration: *Collins* v. *Collins* (3); and is irrevocable, as was admitted in *Mills* v. *Bayley*. The arbitrator has not exceeded his authority. The terms of the reference are quite unlimited. The arbitrator is to say "what sum shall be paid," and this general power cannot be cut down by the recital of the offers previously made and declined. The result of the evidence is, that the limited construction of the reference was an afterthought of the Plaintiff, when he found that the arbitrator was likely to award him less than he expected.

Again, a revocation must be absolute, and the letter of the 6th of January was no revocation, because it purported to be merely a conditional revocation. Therefore the award is binding. But even if the award is bad, the agreement that the Plaintiff should sell his interest in the business and assets to the Defendants is binding, and it should either be referred back to Mr. *Thornton* to make a new award, or the amount to be paid to the Plaintiff should be ascertained in Chambers: *Gregory* v. *Mighell* (4). After the agreement has been so far acted upon that the Defendants have given up the offices which they had taken, and with the Plaintiff's consent commenced business on their own account in the offices of the old firm, the Court will not, upon an interlocutory application, appoint a receiver, the effect of which would be to stop the Defendants' business. There is no suggestion that the assets are in danger of being lost.

[At the conclusion of their argument the Defendants' counsel

(1) 2 H. & C. 36; 32 L. J. (Ex.) 179; 11 W. R. 598.
(2) 1 J. & W. 505.
(3) 26 Beav. 306.
(4) 18 Ves. 328.

stated that the Defendants were willing to give security for £20,000 to answer any demand which the Plaintiff should be found to be entitled to in the suit.]

SIR R. MALINS, V.C., after stating the facts and commenting on the evidence, and expressing his opinion that on the 1st of January, 1870, the offer of the Plaintiff to sell his interest for £20,000 and the offer of the Defendants to give £18,000 had not been withdrawn, and were continuing offers, and that the agreement for reference proceeded on that basis, and that both parties intended to refer to Mr. *Thornton* the simple question of the difference between £18,000 and £20,000, and that the Plaintiff, when he discovered that the referee was going below £18,000, was perfectly justified in revoking his authority, continued:—

The first question before me, therefore, is as to the proper construction of the agreement, and upon the construction of that instrument I have not a shadow of doubt, and the counsel for the Defendants have not pointed out to me any satisfactory reason why, if it was to be an open reference, those sums of £18,000 and £20,000 were mentioned in the submission of reference at all. If it was to be an open reference, it was improper that any sums should be mentioned, because they were calculated to influence the judgment of the arbitrator. If they intended that the question should be left open, it should have gone to him unbiassed by anything the parties had proposed. Therefore there could be but one object in putting those sums in, namely, to shew that one having offered and continuing to offer £18,000, and the other having demanded and continuing to demand £20,000, he had to decide what was to be the result. On the first question, therefore, namely, the construction of the instrument, I am entirely against that of the Defendants and in favour of that of the Plaintiff.

The next question is, whether this is a revocable instrument. Now, upon that subject I have had much argument, and I have been referred to authorities. It is not questioned that before the statute 3 & 4 Will. 4, c. 42, all references to arbitration were revocable until the award was made. As I have already said, such reasons existed here as, in my opinion, were abundantly sufficient to justify a revocation, but that a person should, when

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he had once made a reference to arbitration, be entitled from mere caprice to revoke it is, in my opinion, a monstrous state of things, and it has been so regarded by many Judges. But the 39th section of the 3 & 4 Will. 4, c. 42, limited the power of revocation to a certain extent. [His Honour read the section, and continued:—] That, therefore, only makes it irrevocable where it is agreed that the submission shall be made a rule of some Court. The *Common Law Procedure Act* carries the matter further, and provides that every reference to arbitration may be made a rule of Court, whether the submission contains an agreement to do so or not. But I have followed Sir *Roundell Palmer* and Mr. *Hemming*, who argued that point elaborately, and I am unable to find anything in the Act of Parliament to support the proposition that no reference whatever is revocable, and the contrary has been determined by Judges of great eminence in the case referred to.

I may state here that if in this case the Plaintiff and Defendants, without having entered into any negotiation as to what should be paid by one and received by the other, had in the beginning referred it to Mr. *Thornton* to say, in the language of the instrument, what sum should be paid by one to the other, that would not have been an arbitration, but would have been merely a reference to a valuer, and would not have been a revocable instrument. But if there be a difference between the parties, then a reference to settle those differences is an arbitration. I have been referred to the decision of the Master of the Rolls in *Collins* v. *Collins* (1). Sir *Roundell Palmer* cited it, and I must confess I was somewhat surprised at his having cited it. I listened attentively to the reading of the judgment, and I must say I thought every word he read was directly against him. Now, what was the point before the Master of the Rolls? There had been an agreement to sell a brewery, one man to sell and another to buy, and there had been no price named; it was referred to two valuers to say what the price should be, and the valuers were to choose an umpire; but they could not agree upon an umpire. The 12th section of the *Common Law Procedure Act* gives power to appoint an umpire when the arbitrators do not appoint one, and an application was made to the Master of

(1) 26 Beav. 306.

the Rolls to appoint an umpire under the Act; but before he could do that he was obliged to decide whether it was an arbitration, and he came to the conclusion that it was not an arbitration, because there was not a particle of difference between the parties. One had agreed to sell and the other to buy; and they were in no difference as to the price, because no price had been named; but directly one names a price, and the other names another price, and they differ about it, then arises a difference, and a reference to settle that difference is, in my opinion, an arbitration. [His Honour then read the passage in the judgment in *Collins* v. *Collins* (1) commencing, "It becomes necessary"—and ending "that appears to be an arbitration in the proper sense of the term," and continued:—] In the present case one party has named the price he is willing to give, and the other party has named the price he is willing to receive; it is therefore, according to Lord *Romilly*, in the strict and proper sense of the term an arbitration.

In the case of *Mills* v. *Bayley* (2) there were two questions referred to arbitration; one was simply to ascertain a measurement; that was not an arbitration; and it was said, therefore, that it could not be revoked; but matters in difference between the parties were also referred to the same person. Lord Chief Baron *Pollock* in that case says, "It seems upon the authorities that where it is part of an agreement that it shall be referred to a particular individual to ascertain the amount due for work done under the contract, as is frequently done to an architect in a building contract, such agreement cannot be revoked by one of the parties."—that is the principle of the case of *Collins* v. *Collins* (3)—"But here there are two references to *Neville:* one to ascertain the quantity of mud removed, which, on the principle above stated, could not be revoked; the other as to settling disputes, which, according to the authorities is revocable." Then Baron *Martin* goes more fully into the matter. He says, "I am of the same opinion, though I very much regret that the rule of law should be as it is, and think it is a pity that the legislature, when they touched on the law of arbitration, did not interfere further and make all agreements to refer irrevocable"—which has

(1) 26 Beav. 311, 312. (2) 11 W. R. 598, 599. (3) 26 Beav. 306.

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been argued before me to be the law, but which is expressly stated by the learned Baron not to be the law—"It is quite true, that if the agreement was simply that the quantity of work done should be ascertained by a particular individual, that would be irrevocable, because that is not really an arbitration. But this case falls within the rule of law, that an agreement to refer matters of dispute to arbitration is revocable, and Mr. *Gray* was not able to cite any case to the contrary. If *Neville* had simply measured the mud I should have thought that a declaration founded upon his measurement was right and not answered by the plea, but the declaration states that he made an award in the character of arbitrator, and the plea states that his authority was revoked by the Defendant before the award, and therefore, though I much regret it, I think our judgment must be for the Defendant."

That, therefore, is a distinct authority upon the point, as to which I think I should have come to the same conclusion. There is nothing against it but that *dictum* of Lord *Cranworth's* (1), which, as I pointed out, did not apply to an English case. I do not think he had the terms of the English Acts of Parliament before him, because it is perfectly clear that by law, independently of the statutes, every reference to arbitration is revocable, and the right of revocation is only qualified in the manner I have pointed out by the 3 & 4 Will. 4, c. 42, and the qualification is not extended by the *Common Law Procedure Act*, 1854.

Therefore, upon this question of the revocability of the award, I am also in favour of the Plaintiff and against the Defendants. If it had been subject to no other objection, I am of opinion that the authority of Mr. *Thornton* was determined by the notice of the 6th of January, and that his award, made four days after, is an absolute nullity, and therefore not binding on the Plaintiff.

Even if I am wrong on the first two points, that this is a limited reference, and, secondly, that this is a revocable instrument, I should then further be of opinion that it was so distinctly the intention of one side to fix a minimum of £18,000, that an arbitration made on any other footing would, in my opinion, have been made under a mistake, and such a mistake as would disentitle the Defendants to what they ask.

(1) 2 Macq. 4.

8 Ch D 33

Upon the whole case, therefore, I have come to the conclusion that the Plaintiff has sustained his case, that there is no award whatever, that the terms of the dissolution of this partnership are not ascertained and settled; the question therefore is perfectly open, and an account of the dealings of this partnership will have to be taken when the cause is brought to a hearing. That, of course, except by consent, can only be done in that stage of the cause. Then what is to be done in the meantime? I am a good deal struck by the circumstance that the bill was filed on the 15th of November, when the disputes first began, and notice of motion is not given until the 26th of January, and the bill is not amended. In the interval all these transactions with regard to the reference and the revocation, and all that I have heard from the affidavits had taken place, and yet the motion is brought on without amending the bill or stating any of these facts. In one view of the case, I should have called upon Mr. *Glasse* to reply upon that point, but the offer made by the Defendants' counsel I think relieves the case of that difficulty. It is the right of one partner as against the others in a dissolved partnership to have a receiver to take care of the partnership property. The argument which Mr. *Cotton* urged upon me, that these gentlemen were solvent and able to answer any demands, is a thing which the Court cannot listen to; a man who goes out of a partnership has a right to have his property put in security, and the only mode of doing that known to the Court is appointing a receiver, or that which is a substitute for it, giving security. There would be a great deal of difficulty in this case in appointing a receiver, because the Plaintiff has allowed the Defendants materially to alter their position, to assume a new firm, take a new name, and do various acts detailed in the affidavits. At the same time it would be my duty to protect the Plaintiff's interest in the partnership business. But the offer which has been made will obviate that difficulty, because Mr. *Cotton*, on behalf of the Defendants, has offered to give security for £20,000, if the Plaintiff is entitled to it. I must consider, for the reasons I have stated, that there was a continuing offer on the part of the Plaintiff to take £20,000; he has put that as the maximum. If he gets £20,000 I shall consider that he has got all he ever bar-

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gained for; and therefore, in this stage of the cause, I think it will be sufficient if, instead of an order for a receiver, the Defendants give security for £20,000, to answer any demand which the Plaintiff may establish with respect to the partnership dealings and transactions.

After some further discussion it was arranged that the motion should stand over with a view to an arrangement; and on the 2nd of March the terms of an order were agreed on between the parties.

Solicitor for the Plaintiff: Mr. *James Mason.*
Solicitors for the Defendants: Messrs. *Clarke, Son & Rawlins.*

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PRICE *v.* HUTCHISON.

Motion to commit—Cons. Ord. XLII., Rule 2.

Upon motion under Cons. Ord XLII., rule 2, two Respondents were committed to prison for violent and abusive language used towards a person serving the process of the Court.

THIS was a motion under Cons. Ord. XLII., rule 2, that the Defendants, *William Hutchison* and *Middleton Cowart*, might be committed for using violent and abusive language to a person serving the process of the Court.

The Defendant, *William Hutchison*, who was described as a merchant, was the assignee of the estate of *M. Cowart*, and a bill having been filed against him, Mr. *Vanderpump*, a clerk of Messrs. *Linklaters, Hackwood, & Addison*, was sent to *W. Hutchison's* office to serve him with a copy of the bill.

Mr. *Vanderpump*, in his affidavit, describing what took place upon the occasion, stated that he called on Mr. *Hutchison* and found Mr. *Cowart* there. He served the former with a copy of the bill in a proper and respectful manner, and explained to him the nature of the papers. Upon this Mr. *Hutchison* refused to take the papers, and threw them at Mr. *Vanderpump*, and insisted that he should take them to his solicitor's. Upon Mr. *Vander-*

pump refusing to do so, Mr. *Hutchison* put his back against the door, locked it, and refused to allow Mr. *Vanderpump* to leave the office unless he took the papers away, saying he had no business to come there with such papers and upon such Chancery tricks. Mr. *Vanderpump* again tried to leave the room, when both *Hutchison* and *Cowart* forcibly detained him, and threatened to throw him out of the window, and also threatened to strike him with their fists. Mr. *Vanderpump* thereupon knocked loudly at the door, and called "Police!" several times. *Hutchison* and *Cowart* continued their violent and threatening conduct until the arrival of two policemen, who, upon hearing the statements of the parties, protected Mr. *Vanderpump*, and enabled him to leave the room. *Hutchison* still endeavoured to force the papers upon him, and threw them after him as he left the room.

The two policemen had made affidavits confirming the statement of Mr. *Vanderpump* as to all that took place in their presence.

Messrs. *Hutchison* and *Cowart* admitted their endeavours to prevent Mr. *Vanderpump* from leaving the room without taking the papers away, but denied having used violence.

On the next day the following letter was addressed by Mr. *Hutchison* to Messrs. *Linklaters*:—

"We are much disgusted with the conduct of your Mr. *Vanderpump*, and unless we have an apology from him for the same (having a witness present), we shall instruct our solicitors to bring an action against him for trespass and violence."

Mr. *Glasse*, Q.C., and Mr. *Chitty*, in support of the motion, cited *Elliot* v. *Halmarack* (1), and *Williams* v. *Johns* (reported in a note to that case), which were said to be the only authorities upon this question.

Mr. *Jones-Bateman*, for Messrs. *Hutchison* and *Cowart*, submitted that Mr. *Vanderpump* ought at once to have carried the papers away and left them with the solicitor, as he was desired to do; and that there had been no violence used which should induce the Court to make an order for committal.

(1) 1 Mer. 392.

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SIR R. MALINS, V.C.:—

This is one of the most extraordinary cases that has ever been brought before the Court. It details a course of conduct which is almost incredible. The affidavit of Mr. *Vanderpump* has been confirmed in various particulars by the two policemen, and the Respondents have admitted and corroborated every material statement. After what has been stated, I am bound to say that I believe every word in Mr. *Vanderpump's* affidavit; and the denial by the Respondents that they committed any violence I totally disbelieve. The letter which the Respondents wrote on the following day to Messrs. *Linklaters* was intended, upon a false statement of the facts, to cause Mr. *Vanderpump* to lose his employment. This I must characterize as most disgraceful conduct.

They have been guilty of the most improper conduct towards Mr. *Vanderpump*. When they considered themselves in danger they turned round, and thought they would get an advantage by making a charge against him. The whole thing is, in my opinion, most disgraceful to them. It is not a slight thing that the process of this Court should be treated with contempt, or that a person who is engaged in serving the process of this Court should be molested in the discharge of that duty, or that anything should take place which could throw any doubt whatever as to his personal safety in the conduct of the business of this Court. The case has been brought before me upon a motion for contempt. This Court usually takes so lenient a view of the liberty of the subject, and is so much inclined to put a merciful construction upon the acts of parties, that it usually is satisfied, in the first instance, by the payment of costs; but in this case, I think I should fall very far short of the discharge of my duty if, upon conduct so contemptuous as this —so flagrant a disrespect to this Court, so broad and palpable an infringement of the liberty of the subject—I did not mark my dissatisfaction by doing much more than making these gentlemen pay the costs. To one of them, Mr. *Hutchison*, probably the payment of costs would be a very trifling consideration. I shall not let him off with the payment of the costs, but he shall feel that this Court and those who are engaged in the discharge of duties attached to it are not thus to be treated.

I therefore make the order for the committal of both these

Respondents. I further hope that Messrs. *Linklaters & Co.* will lay these papers before the Court of Bankruptcy, and make an application for the discharge of Mr. *Hutchison* from the assigneeship, for which, by this course of conduct, he has shewn himself totally unfit.

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The order will be for the committal, according to the notice of motion.

Jan. 12. Mr. *Jones-Bateman* moved for the discharge of the Defendant, *W. Hutchison*, who had surrendered himself on the 27th of December, and had now written a letter expressing regret for his conduct towards Mr. *Vanderpump*, and making an ample apology to the Court and to Messrs. *Linklaters & Co.*

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The Court made an immediate order for the discharge of the prisoner, upon his paying, by way of deposit, the sum of £40 towards the expenses incurred in respect of these proceedings. The costs to be taxed, and Mr. *Hutchison* undertaking to pay what more might be found due from him, and Messrs. *Linklaters* to return any surplus there might be.

A similar order was made on the 19th of January for the discharge of Mr. *Cowart*, who had not surrendered himself till the previous day, upon his depositing £10 towards the costs, to be dealt with in the same way.

Solicitors for the Motion: Messrs. *Linklaters, Hackwood, & Addison.*

Solicitors for the Respondents: Mr. *Anthony Carr.*

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WHEATLEY *v.* WESTMINSTER BRYMBO COAL COMPANY.

Coal Mines — Covenant to work uninterruptedly, efficiently, and regularly— Minimum Rent—Power to compel increased working—Remedy at Law— Directions in Chambers.

15 L.T.D. 116

The Plaintiffs granted a lease of a coal mine to the Defendants, reserving a minimum rent of £720, to be increased to £1000 in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual or most improved practice. The lessees paid the minimum rent, but only raised a small quantity of coal by working through an adjoining mine without sinking pits on the Plaintiffs' property. The Plaintiffs being desirous of enforcing a larger amount of working, whereby an increased rent would be payable, filed a bill for specific performance of the covenant in the lease :—

Held, that there was no obligation upon the Defendants to sink pits, although that might be the most efficient mode of working; and that, so long as the minimum rent was paid, the Defendants could not be compelled to work the mine at all; that the lessees had committed no breach of contract; but if they had done so, the remedy was at law and not in equity; and that this Court could not, by a reference to Chambers, give effect to the covenant by directions as to the management of a coal mine.

Bill dismissed with costs.

THIS bill was filed by *Thomas Randall Wheatley* and *Moreton John Wheatley* against the *Westminster Brymbo Coal and Coke Company, Limited*, for a declaration that the Defendant company was bound to work the *Gwersylt* coal and ironstone mine, of which the Plaintiffs were the owners, uninterruptedly, efficiently, regularly, and according to the usual and most approved practice adopted in working mines of coal and ironstone, according to the provision of the lease under which the company held the mines, and also that the company was bound to work the "*Two-yard*," "*Brassey*," and "*Main*" seams in such a manner as not to get one and leave the others ungotten.

On the 12th of February, 1859, the Plaintiffs, being seised in fee of the *Gwersylt* estate in *Denbighshire*, entered into an agreement with the company to grant them the lease in question. By this contract the lessees were to have two years for proving the coal,

paying for all that should be gotten during that time; and at the expiration of the two years the lease dated the 7th day of July, 1862, was made between the Plaintiffs of the one part, and the Defendants of the other part, by which the Plaintiffs granted, demised, and leased unto the Defendants, their successors and assigns, the mines, seams, veins and beds of coal, and balls and bands of ironstone under the *Gwersylt* estate, containing 465 acres, with full power and license to the lessees to enter upon the estate, and to erect or remove buildings and machinery necessary for setting the coal and ironworks afoot, and to bore and search for coal, and to drive, sink, and use any pit, shaft, or tunnels, or, if necessary, subterraneous work, and to do all other acts, matters, and things within, through, over, or on the estate for working the mines, and manufacturing ironstone, pig, or wrought iron, and selling and disposing of the same; and also generally into and out of the said *Gwersylt* estate, to work and drive by outstroke, instroke, and substroke, getting and carrying away the produce of the *Gwersylt* mines, as well as any other mines, and to connect the works with the *Brymbo* mineral branch of the *Great Western Railway*. The lease was for twenty-one years from the 29th of September, 1866, renewable for a further term of twenty-one years, and determinable as after mentioned, the lessees paying as follows: For the first year, the fixed minimum rent of £500; for the second year £600; for the third year £700; and for the fourth, and every following year £720, and so in proportion for less than a year. But in case at any time during the term the lessees or their successors should sink a pit or shaft, then from and after the expiration of two years they should pay a minimum fixed rent of £1000, all the minimum rents so fixed to be paid half-yearly. There were also provisions for payment of a royalty of £30 per acre for workable and saleable coal of one foot thick of the several seams called "*Two-yard*," "*Brassey*," and "*Main*" coal, and £20 per acre for coal of inferior quality; and £20 per acre for all other seams; with the usual clause, that if in any one year they should not work up to the fixed rents, the deficiency might be made up in subsequent years; and there were provisions for royalties on the ironstone. The lease also contained a covenant on the part of the lessees that they would at all times during the

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continuance of the terms thereby granted work and carry on the said mines of coal and ironstone thereby demised, uninterruptedly, efficiently, and regularly (except in the event of strikes of workmen or other casualties), according to the usual or most approved practice adopted and used in the working of mines of coal and ironstone; and should and would get and raise the said seams and beds of coal thereby demised clearly out in regular course, and should work the upper of the said seams or beds, respectively called the "*Brassey*," the "*Two-yard*," and the "*Main*" coal, each seam in advance of the seam next before it respectively, so as not to endanger the other seams by undermining. Power was reserved to the lessees to give up possession at the end of five years, or at any time afterwards, on twelve calendar months' notice, with a clause giving power to refer all differences to arbitration. The bill alleged that the three seams of coal contained altogether about 9,000,000 tons; that the Defendant company were lessees of the *Brymbo* mines, adjoining the mines now leased and held under the Marquis of *Westminster*, and they had sunk pits on the adjoining estate, and by means of an inclined plane or downbrow driven into the "*Brassey*" seam they had worked that seam without the others, but only to a small extent.

The case came on in January, 1865, upon motions for an injunction and to stay proceedings in the suit, before Vice-Chancellor *Kindersley* (1), who refused both motions.

The cause now came on for hearing. The bill charged that the Defendants had not worked the mines according to the lease; the working having been altogether illusory, and from 1862 to 1868 only an acre and three-quarters of the "*Two-yard*," and eighteen acres of the "*Brassey*," having been worked, the "*Main*" not having been worked at all, and the quantity not exceeding 110,000 tons, and not one-ninth of the quantity worked out of the *Brymbo* mines; and if the Defendants continued to work as they had done, not more than one-twelfth of the coal would be gotten within the term of the lease; that the beds of ironstone were very valuable, and that they had not virtually been worked at all; that if the Defendants had worked the coal and ironstone according to the lease, royalties would have been payable to a

(1) 2 Dr. & Sm. 347. 11 Jur. N.S. 282

very large amount, and owing to the Defendants' neglect and default the Plaintiffs had suffered a great pecuniary loss. The bill also charged, that the Defendants were bound to work all the seams regularly, whereas they did not commence working at all until five years after the date of the lease, and nine months after the filing of the original bill.

The Defendants, by their answers, insisted that they were working the *Gwersylt* mine efficiently, and in precisely the same manner as they were working the *Brymbo* mine, but that they were at liberty to work one seam and leave the others, as they thought convenient. That they had hitherto been unable, from the depressed state of the coal trade, to find a market for a larger quantity of coal than they had worked from the Plaintiffs' mines; that they were not bound by the lease to carry on the works by means of pits; but that, according to the terms of the lease, it was at their option to do so or not, as they thought proper; and inasmuch as they had regularly paid the dead rent, that was all that could be required of them.

A considerable amount of evidence was gone into on both sides, chiefly having reference to the question of sinking pits. The Defendants had only worked the coal under the *Gwersylt* estate by means of downbrows from the adjoining mines, and had never sunk pits upon the *Gwersylt* estate. The principal witnesses on behalf of the Plaintiffs, namely, Messrs. *Shone*, *Cadwaladr*, and *Livesey*, expressed their opinion that it was impossible to work the mines efficiently without sinking pits on the *Gwersylt* estate. This, however, was denied by the evidence adduced on behalf of the Defendants.

Mr. *Glasse*, Q.C., and Mr. *Nalder*, for the Plaintiffs:—

The Defendants are bound by their lease to work this mine uninterruptedly, efficiently, and regularly, according to the approved practice. The meaning of these words must be that they are to work without intermission, and to do so in such an efficient manner as to obtain such an amount of coal as could be obtained by the most approved method of working. They have, on the contrary, broken their covenant in every respect. It was not till some time after the lease was granted that they commenced working the

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coal, and they have only continued the works at intervals, therefore they have not worked uninterruptedly. There is evidence to shew that the only efficient means of working the mine is by sinking pits upon the land. This they have not done; but all they have done is to work one only of the seams, by means of an inclined plane or downbrow through their mines in the adjoining land, belonging to the Marquis of *Westminster*. The Defendants have not in any year worked coal sufficient to amount to the minimum or dead rent which they are bound to pay; the consequence of this is, that the Plaintiffs are not receiving the full amount of increased rent in the way of royalties which they are entitled to, and would receive if the mines were effectually and properly worked. As it is, they receive only £720 a-year, while they ought to be in receipt of at least £2000 a year. The real cause for this course being pursued by the Defendants is, that they are working the adjoining mines to the fullest extent that they are capable of, and it is more for their advantage to sell that coal and keep the coal from the Plaintiffs' mine out of the market. They consequently prefer paying the dead rent in order to prevent any other person from working the coal. The evidence goes to prove that the only efficient mode of working is by pits sunk in the land, but the Plaintiffs are not particular as to the mode of working so long as the coal is efficiently worked; and the best mode by which this may be done can be ascertained in Chambers. All we ask is, that the Defendants shall be ordered to work in pursuance of the terms of their covenant. The words must mean something, and if there is any doubt about the mode of working, directions can be given in Chambers.

It was held in *Tipping* v. *Eckersley* (1) that where the construction of a contract is clear, and the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the Court to interfere: *Anon.* (2); *Clavering* v. *Clavering* (3); *Birmingham Canal Company* v. *Lloyd* (4). There is no suggestion here that the damage is not substantial, and it is quite clear that the amount of damage may be clearly ascertained: *Lloyd* v. *London, Chatham, and Dover Railway*

(1) 2 K. & J. 264.
(2) Amb. 209.
(3) 2 P. Wms. 388.
(4) 18 Ves. 515.

Company (1); and in cases of contract like the present, specific relief will be granted without reference to the amount of injury: *Dickenson* v. *Grand Junction Canal Company* (2). That an effectual decree can be made for deciding as to the mode of working the coal is shewn by *Hood* v. *North Eastern Railway Company* (3); where a covenant was entered into by the railway company that a certain piece of land should be used as a first-class railway station. The Court decreed specific performance of the covenant, with a direction that the rooms and offices necessary to constitute a first-class station should be ascertained in Chambers.

A similar reference to ascertain the mode of carrying out certain works was directed in *Lytton* v. *Great Northern Railway Company* (4) and in *Sanderson* v. *Cockermouth and Workington Railway Company* (5); and *Wilson* v. *Furness Railway Company* (before Vice-Chancellor *James*, on the 3rd of November, 1869).

The VICE-CHANCELLOR expressed his opinion that there was no obligation upon the Defendants to work the Plaintiffs' mine by sinking pits, and on that part of the case he did not require counsel to address the Court.

Mr. *Cotton*, Q.C., and Mr. *Freeling*, for the Defendants:—

If it is to be ascertained by a reference to Chambers how the mine is to be efficiently worked, it will compel the Court not only to take on itself the constant inspection of the mine and constant directions as to the mode of working, but it will materially interfere with the proper working. We should be obliged to go to Chambers from time to time to ascertain whether our system of working is consistent with what the Court may deem an efficient working, and this would interfere with the discretion of those who have the superintendence of the mine. There is, in fact, no complaint of our mode of working, it is simply a money demand—a means of compelling us to pay a higher rent. No injury whatever is alleged, and the Court, therefore, will not interfere, but will leave the Plaintiffs to their remedy at law. If the sleeping rent is not the rent that should be paid, there is no means of ascertaining

(1) 2 D. J. & S. 568.
(2) 15 Beav. 260.
(3) Law Rep. 8 Eq. 666.
(4) 2 K. & J. 394.
(5) 19 L. J. (Ch.) 503.

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what the rent must be. The real question is, whether we are bound to work more coal than we are working. The fact is, that the lessees have not worked up to their dead rent, but that they have spent a large sum in opening up the mine is sufficient answer to any allegation of *mala fides*. If there had been any fraud connected with the working, then the Court might have interfered, but there is no allegation of improper working. The only complaint is an insufficient working. Upon this point we maintain not only that we cannot be compelled to work more than we have done, but that we may, if we choose, discontinue altogether the working, and that we may work as little as we please, so long as we pay the dead rent. There is no authority for saying we can be compelled to work, though if we do work we are bound to work in a skilful and proper manner: *Quarrington* v. *Arthur* (1).

The Counsel were here stopped by the Court.

Mr. *Glasse*, in reply, cited *James* v. *Cochrane* (2); *Green* v. *Sparrow* (3); *Ridgway* v. *Sneyd* (4); and *Rogers* on Mines (5).

SIR R. MALINS, V.C.:—

This case has been very elaborately and carefully argued, and it will not, therefore, be for want of the most complete assistance on the part of counsel that I shall err, if I do err, in the judgment I am about to give.

The case raises points of great importance, not only to the parties concerned, but also to that large portion of the community engaged in mining operations. The rights of the parties must depend, however, on the legal contract existing between them, which is constituted by the lease of the 1st of July, 1862, and which is fully set out in the bill.

But before I go to the terms of that lease it is not unimportant to look at the position of the parties, and to see what were the circumstances which led to the execution of that lease.

(1) 10 M. & W. 335.
(2) 8 Ex. 556.
(3) 3 Sw. 408, n.
(4) Kay, 627.
(5) Page 574.

The Plaintiff, Mr. *Thomas Randall Wheatley*, and his son, Mr. *Moreton John Wheatley*, who is a captain in the Royal Engineers, have been for some years past the owners of the property in question, and at the time of the contract they were seised in fee of the land on which the mines in question are situated. The *Gwersylt* is an estate of 465 acres in extent. It has immediately adjoining to it an estate called the *Brymbo* estate, which was, in the year 1859, and had been for some years before that time, worked by the Defendants, who had then been and are now working the adjoining mine on a large scale. The coal measures lying under this property have an inclination, as appears from the evidence, of about 1 in 7. The Plaintiffs' estate being immediately adjoining the estate which is held by the Defendants under a lease from the Marquis of *Westminster*, the dip of the measures is from the Defendants' estate down to the Plaintiffs' estate, so that, of course, in working the Plaintiffs' estate they must work at a greater depth than they do in working the Marquis of *Westminster's* estate. It appears that no attempt had been made prior to 1854 to grant any lease, nor to have the coal under this estate worked, and that doubts were entertained whether, if coal were found, it would be found in a workable condition, and a profitable property to work. That may have been the cause why no steps were taken either by *Wheatley* or his son to procure the working of these mines. However, as the case now stands, the evidence is quite clear that the quantity of coal under the Messrs. *Wheatley's* estate is not less than 9,000,000 tons, and that it is capable of being worked to the extent of 500 or 600 tons a day, which, at the royalty that is paid under this lease, amounting to 6*d.* a ton, would produce a very large income to the Messrs. *Wheatley*. The agreement which was executed by the parties on the 20th of February, 1859, is conclusive evidence as to doubts of the practicability of working the mines, since it was provided that the Defendants should be allowed two years to prove the existence of coal, paying only for the quantity got. The other terms of the agreement were carried into effect by the lease itself, which was executed two years and a-half after the contract. The works were opened sufficiently for the purpose of proving the coal, and the Defendants having satisfied themselves that the coal was there, and that it

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was in a workable condition, the rights of the parties were finally determined by the lease of the 1st of July, 1862. [His Honour then stated the provisions of the lease already fully set out]:—

Now, it has been contended that there is an obligation in this lease to sink pits, and there is no doubt that common sense would point out that if there be a demise of a coal mine unopened, and there is not an adjoining one open, the only way in which you can by any possibility get to the coal, is by sinking pits; but I confess I can have no hesitation in coming to the conclusion that the object of these lessors in 1859 or 1862 (although their views may have changed) was not to encourage the sinking of a pit, but rather to discourage it, and therefore they give the power to the Defendants of working these mines by instroke and substroke, and then provide that if (not therefore contemplating that it would be a matter of course that pits should be sunk), but that if pits should be sunk, then, that, instead of encouraging the sinking of those pits by diminishing the sleeping rent on account of a great expense being incurred in sinking them, they increase the sleeping rent from £720 a year to £1000 a year. The portion of the covenants which has been mainly relied upon, and which has been in fact the subject of this suit, is in these terms: "And also that the lessees shall and will work and carry on the said mines of coal and ironstone hereby demised, uninterruptedly, efficiently, and regularly (except in the event of strikes of workmen, accidents, or other casualties,) according to the usual or most approved practice adopted and used in the working of mines of coal and ironstone, and shall and will get and raise the same seams and beds of coal hereby demised, clearly out in regular course, and shall work the upper of the said seams or beds respectively called '*The Brassey*,' '*The Two-yard*,' and '*The Main Coal*,' each seam in advance of the seam next before it respectively, so as not to endanger the upper seams or seam by undermining." Then there is a clause containing a power to the lessees at any times at the end of seven years, or at the end of any one year, by twelve months' notice after that time to determine the lease. From the time of the execution of this lease in July, 1862, it is admitted the Defendants have regularly paid to the Plaintiffs the sleeping rent of £720 per annum, but considering that in 1862 the existence and workability

of the coal under the *Gwersylt* estate had been proved, and that the lease had been executed in the expectation on the part of the Plaintiffs, as in the belief also on the part of the Defendants, that large mining operations would be carried on under this estate, it is not to be wondered at that the Messrs. *Wheatley* became greatly disappointed at the result which took place, namely, that they did not get more than the sleeping rent of £720 a year. I think it will be found, in order to work up to the sleeping rent, it would require something like eighty or ninety tons to be worked out every day. The evidence is clear that there would be no difficulty whatever in working the colliery to the extent of some 200 or 300 tons a-day, and, of course, if they work 300 tons a day, it would give the lessees, in the shape of royalty, 300 sixpences, or £7 10*s.*, and that would make a large increase in their receipts. Finding, therefore, that in the year 1865 they got nothing but their sleeping rent, and that that sleeping rent had not been worked up to, it being also admitted on both sides that up to the present time the workings have not amounted to the sleeping rent by some £2000, so that now the lessees will be at liberty to work so many tons at 6*d.* a ton as will produce £2000, without paying anything additional. I repeat that it is not to be wondered that the Messrs. *Wheatley* were disappointed at the result of the operations in 1865. At the same time they should have remembered that £720 is a very large addition to the income on an estate of 465 acres without the slightest damage being done to it, and without any portion of the surface being touched, nothing being done upon their estate which anyone walking over it could by possibility have discovered. Therefore, although it was open to both parties to entertain these different views of their dealings with one another, the question is, whether anything has taken place which justifies the institution of this suit. The original bill was filed on the 5th of January, 1865. The dissatisfaction of Messrs. *Wheatley* at that time and their dissatisfaction now is not, I am certain, as to the mode of working the mine by the Defendants, but as to the extent of the working only. If the extent of the working had been sufficient, I am perfectly satisfied that this bill would never have been filed; what they want is to receive more money in the shape of royalty. It is perfectly clear, for the reasons which I have already stated, that

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neither in 1859 nor in 1862 did the parties contemplate that pits would be sunk, nor did the Messrs. *Wheatley* desire that they should be sunk. On the contrary, I think it is obvious they desired they should not be sunk. That question was distinctly raised by the original bill. The present bill does not in terms pray that they should be ordered to sink pits, or require that they should do so. But the evidence in the cause, as now given, is directed expressly to this point. If the evidence of Mr. *Shone*, the Plaintiffs' mineral agent, gives a correct view, the lease of 1862 might have thrown the obligation of sinking pits upon the Defendants; whereas, as I have already observed, instead of throwing that obligation upon them it relieves them from it, and rather goes to prohibit than to favour it. But Mr. *Shone* says that ever since he became concerned for the Plaintiffs he has been strongly of opinion that it was and is necessary to sink pits upon the *Gwersylt* estate, in order effectually to work the mines thereunder; and he says he continuously urged this without success till the month of September last, when the Defendants gave him a notice requiring to take a piece of land for the purpose of sinking a pit or pits thereon. Mr. *Cadwaladr*, who, no doubt, is a gentleman of great experience, follows the same idea (I do not see the slightest reason to dissent from his evidence, on the contrary, as far as I can form any opinion upon the subject, I think that the evidence of Mr. *Shone* and Mr. *Cadwaladr* is well founded). Mr. *Cadwaladr* says, and there is no doubt about it, that these collieries never can be worked to the fullest advantage unless pits are sunk upon the estate. But it does not, therefore, follow from that that the Plaintiffs are entitled to have them so worked.

Then the next witness, Mr. *Livesey*, a gentleman of great experience, entirely confirms the views of Mr. *Shone* and Mr. *Cadwaladr*. In fact, all the principal evidence for the Plaintiffs is directed to the necessity and the obligation of sinking pits.

It is stated that from the 1st of January, 1862, down to the present time the Defendants have worked only about one acre and three-quarters of an acre of the "*Two-yard*" seam, and only about eighteen acres of the "*Brassey*" seam, and they have not worked the "*Main*" seam at all, and the quantity of coal worked by them up to the present time does not exceed 110,000 tons, and not more than

one-ninth part of the total quantity of coals worked by the Defendants out of the mines of the Marquis of *Westminster* and others; and if the Defendants are permitted to continue working in the same manner not more than one-twelfth of the coal in the mines will be gotten within the term of the lease—that is, within forty-two years.

Then it is further alleged by the Plaintiffs that the Defendants' assertion that they are unable to find a market for the coal is without foundation, since they are now selling eight times as much coal raised from the Marquis of *Westminster's* mines as they have raised from the Plaintiffs'; but that if it were a fact that they could not sell the coal, the Defendants might, so as to prevent their working at a loss, determine their lease by giving the Plaintiffs twelve months' notice. The Plaintiffs charge, however, that so long as the Defendants remain lessees they are bound to work according to the terms of the lease.

It was urged by the Plaintiffs' counsel that the covenant to work efficiently and regularly necessarily implied that pits should be sunk, and that the only mode of efficiently and regularly working the mines was by sinking a pit. I have already said that in that view of the case I entirely concur; but that does not settle the question before me, which is, What are the rights of the parties under this lease of the 1st of July, 1862? And although the Plaintiffs and their agents now know much more about this mineral property than they did then, it does not follow, because subsequent experience shews that it would be more desirable that pits should be sunk and that the collieries should be worked upon a larger scale, that the Plaintiffs have the right to require them to be so worked.

That brings me to the question, What is the meaning of this contract? I have already shewn that this lease does not throw upon the Defendants, the lessees, the obligation of sinking pits, but it does throw upon them the obligation to work and carry on the mines uninterruptedly, efficiently, and regularly. It has been contended that they do not work "uninterruptedly, efficiently, and regularly," and that that is proved by the small quantity of coal which is raised. No doubt, if the sleeping rent had been fixed at a sufficient amount—for instance, instead of being £720 it had been fixed at £3000—the interest of the lessors would have been

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that no working should take place, because if they got payment without the working taking place they would have had their royalty and preserved their coal at the same time. It therefore resolves itself into this question, What is the amount of working which this lease throws an obligation on the lessees to perform? It has been argued that they do not work continuously and that they do not work efficiently, because they do not work a sufficient quantity. Upon that subject I take this view, though I do not intend to conclude the parties by anything that I say. The only question before me is, whether a case is made out for the interference of this Court; because, if the parties are of opinion that there is an insufficient or an ineffectual working, I apprehend that the remedy is not in this Court but in a Court of Law. But as I must, for the purpose of determining the questions raised before me, put my interpretation upon this covenant, I have invited the learned counsel for the Plaintiffs to tell me of any instance in which this Court has ever decided that the lessee of a mine is bound to work beyond the amount of his sleeping rent. No such case has been cited, and *Green* v. *Sparrow* (1) does not go to the point in the slightest degree. That was a case of this nature: the agreement was, that a rent should be paid in respect of the colliery from the first quarter-day after 1000 sacks of coal should have been dug. There was no rent to be paid until a certain thing was done; and the point of the case was, that the lessee, who had nearly raised 1000 sacks of coal before a particular quarter-day, refrained from completing the quantity expressly for the fraudulent purpose of depriving the lessor of this rent. The Lord Chancellor there decided that the refraining to complete the 1000 sacks of coal was a fraudulent act on the part of the lessees, and he therefore ordered that the rent should commence as if the 1000 sacks of coal had been dug and raised before the particular quarter-day. But that case does not in the slightest degree tend to shew that when the sleeping rent of £1000 or £720 had been paid there is any obligation on the part of the lessee to go beyond that amount. The difficulty upon this part of the case arises thus:—I have asked the learned counsel for the Plaintiffs if ninety tons a day, which is the quantity I have taken as being the amount which will cover

(1) 3 Sw. 403, n.

the sleeping rent, is not a compliance with the covenant to work uninterruptedly, efficiently, and regularly, what is enough? If the case had been a covenant that they would work a mine to the extent of, say, 200 tons a day, that would be a covenant to pay 200 sixpences, or £5, a day, and that would be a sum, in effect, covering the sleeping rent. If, therefore, the object was to secure a large revenue from this mine by this working, it is most unfortunate that the Plaintiffs should not have been differently advised, and that they should not have had a lease in a different form. However, I can only determine the rights of the parties as they arise out of the contract they have entered into, and there is no contract or provision on which I can interfere; there is nothing to enable me to say how much coal shall be worked, whether it should be 100 tons, 300 tons, or, as Mr. *Cadwaladr* says, 500 tons a day, or 150,000 tons a year. Suppose I were to accede to the proposition of Mr. *Glasse,* and refer it to Chambers to inquire what would be an uninterrupted, efficient, and regular working of the colliery, the consequence would be that I should have as many opinions upon the subject as mining agents could be found to give evidence. Every man would differ as to the proper quantity. It is impossible, therefore, that the Court could have the means of carrying such a contract into execution. I am unable to see that there has been any breach of the contract; but if the Plaintiffs think there has been a breach, I am clearly of opinion that this is not the tribunal to determine that question. What would be the result if I acceded to the prayer of the bill, and I were to direct a reference to Chambers to inquire what ought to be done, and how it ought to be done? Should I not be directing the management of this colliery? Would not the affairs of this colliery be conducted under the direction of this Court? And would not this Court, undertaking to work the colliery, have to give every direction as to how all things were to be done in connection with it—how the wages were to be paid, and, in short, what should be done in every respect?

Mr. *Glasse* cited many authorities, in the principle of every one of which I entirely agree, as to the doctrine of this Court where it will or will not interfere by way of injunction. In this particular case, for instance, there is a contract that the Defendants will

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not sink a pit except in particular parts of the estate. If they had proceeded, in contravention of that contract, to sink a pit in another portion of the estate, it is perfectly clear that this Court would have restrained them by injunction from so doing. If the lessor had covenanted that he would not do a certain thing and had proceeded to do it, this Court would prevent him doing it. If it is a thing to be done under the direction of the Court, and he refuses to do that certain thing, the Court would oblige him to do it; but I take it that nothing is more clear than this: that this Court will not undertake either the construction of a railway, the management of a brewery, or the management of a colliery, or anything of the kind. It will appoint a receiver or manager in certain cases; but for this Court to undertake the working of a colliery, for this Court to superintend workings of this description, is entirely out of the question, and it would, in my opinion, be a violation of all the principles of the Court if I were to make a declaration in this case that they have not uninterruptedly, efficiently, and regularly worked this colliery, or if I were to refer it to Chambers, as I am asked to do, to report what is an uninterrupted, efficient, and regular working of the colliery. As to the difficulty of this Court interfering in the working of this colliery, or matters of that description, what is stated by Lord *Hardwicke* in the anonymous case in *Ambler* (1), and cited by Lord *Eldon* in the *Birmingham Canal Company* v. *Lloyd* (2), is applicable. It was the rule of the Court then, and it is the rule of the Court now. That was on motion for an injunction to stay lessees from working a coal pit irregularly and detrimentally to the Plaintiffs, the lessors. Lord *Hardwicke* said: "The Court grants injunctions to stay working of a colliery with great reluctance, from the great inconvenience it occasions, and never will do it but where there is a breach of an express covenant or an uncontroverted mischief. The present case did not come within either of those reasons, and therefore the injunction is refused."

Now it is a fact that the Defendants are not working up to the sleeping rent, and it is perfectly clear that it is not the interest of the Plaintiffs to oblige them to work up to the sleeping rent, if they cannot oblige them to work beyond it; because the less coal

(1) Page 209. (2) 18 Ves. 515.

they work the more there will be left in the mine, and provided the Plaintiffs are paid their sleeping rent that is all they can possibly require. But the question has been distinctly raised before me, whether in this case, which obliges the lessees to pay a sleeping rent, and to work the colliery "efficiently"—because that is the meaning of it—is there any obligation on the part of the lessees to work at all, or if they do work at all, to work beyond the amount of the sleeping rent? As no authorities have been cited I suppose that none exist. Certainly, I have heard of none myself; and as the point is brought before me, I think I am bound to state my opinion that in all cases of mining leases, if the lessors desire to secure the working of their mines beyond the amount of the sleeping rent, they must in the lease insert covenants which throw that obligation on the lessee.

My own opinion is, that provided the sleeping rent is paid, and there is nothing more than a covenant to work efficiently, that covenant means that if they do work they shall work efficiently and regularly; in other words, they shall work in a miner-like manner; but that it is in the power of the lessee to keep the mines unworked as long as it suits his convenience, and that there is no obligation on him to work if he does not choose, so long as he pays his sleeping rent. Therefore I come to the conclusion, in the absence of express stipulation in this case that they shall work, that there is no obligation on them to do anything more than to pay the sleeping rent.

I come, therefore, to the conclusion, first, that there is no obligation on the part of the company to sink any pits; that the Plaintiffs have entirely failed to shew any breach of the contract on the part of the Defendants; and I come farther to the conclusion that, even if they had shewn a breach in the clause of the contract to work the colliery efficiently, their remedy would have been at law, and not in this Court.

With regard to the minor point, as to working the different seams of coal at the same time, that was the subject of a motion made in 1865, before Sir *Richard Kindersley*, immediately after the filing of the bill. The substance was, that they were working improperly, and not according to the stipulation contained in the lease. Sir *Richard Kindersley*, after full argument, dismissed that

V.-C. M. 1869 WHEATLEY v. WESTMINSTER BRYMBO COAL COMPANY.

motion and made the Defendants' costs costs in the cause, but he refused the Plaintiffs their costs.

Therefore there is the adjudication of Sir *R. Kindersley* upon the point that there is no improper working; and I make the same observation as regards that, that if they are working the mines contrary to the stipulations in the covenant, unless indeed they are doing something so unwarranted that the Court can interfere by injunction, the remedy is not in this Court but in a Court of Law.

My opinion is, that the remedy of the Plaintiffs by this bill is misconceived, the bill fails in its object, the sole object being to compel a more extended working by the Defendants; and upon all these grounds, being of opinion that the bill fails, it necessarily follows that it must be dismissed.

Upon the question of costs, the Vice-Chancellor referred to a negotiation which had taken place in the year 1866, for the settlement of the points in dispute in this cause, when it was agreed that the bill should be dismissed upon payment by the Plaintiffs of £400 towards the Defendants' costs; but that agreement had subsequently fallen through in consequence of the Plaintiffs' insisting upon a right to file another bill having the same object as the first. The Vice-Chancellor said he considered it a most unfortunate thing that this litigation had been continued after it had, as he considered, been fairly and honourably brought to a conclusion in 1866. But as he had decided that the suit had been commenced erroneously and had failed, it must follow the general principles, and must be dismissed with costs.

The Vice-Chancellor also referred to a point which had been raised, that the Defendants were bound to work the ironstone because it had been included in the demise to them, although from there being no sale for it in the neighbourhood and no iron-furnaces in the district the ironstone was entirely useless to them. His opinion was, that the Defendants were not obliged to work the ironstone, and therefore the Plaintiffs' contention in that respect likewise failed.

Solicitors for the Plaintiffs: Messrs. *Coverdale & Co.*
Solicitor for the Defendants: Mr. *Willoughby Raimondi.*

CHUBB *v.* STRETCH.

V.-C. M.
1870
Feb. 28.

Husband and Wife—Debt of Wife contracted before Marriage—Bankruptcy of Husband—Liability of Separate Estate.

Property settled by a woman upon her marriage to her separate use is liable after her husband's bankruptcy for debts contracted by her before her marriage.

THE Defendant, *Mary Meade Stretch* (then *Mary Meade Willing*, widow), in March and April, 1867, accepted, for the accommodation of her brother, bills for £200 and £80, payable two months after date, which were discounted by, and indorsed to, the *Wilts and Dorset Banking Company;* and in July, 1867, she and her two brothers gave their joint and several promissory note to the banking company to secure £700 lent to her brothers. In October, 1867, she married the Defendant, *Henry Stretch;* and, by a settlement made on their marriage, a small freehold estate of which Mrs. *Stretch* was seised in fee simple, and certain sums of money to which she was entitled, were vested in a trustee upon trust for her separate use during the joint lives of herself and her husband.

In February, 1868, the banking company commenced an action on the bills against Mr. and Mrs. *Stretch*, but before judgment could be obtained Mr. *Stretch* was adjudged bankrupt. The banking company proved under the bankruptcy the amounts due on the bills and the promissory note, but no dividend was declared, the bankrupt having no assets, and before the institution of this suit he obtained his discharge.

The banking company then (by their public officer) instituted this suit against Mr. and Mrs. *Stretch* and the trustee of the settlement for the purpose of having the rents and income of the property comprised in the settlement during the joint lives of Mr. and Mrs. *Stretch* applied in payment of the amount due to them on the bills and note.

The Defendants put in a joint and several answer, by which Mrs. *Stretch* insisted that the bankruptcy of her husband, and the proof by the banking company against his estate, had discharged

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her separate estate from all liability to them in respect of the money due upon the bills and note.

Before the answer was filed the Defendants offered to pay the banking company £150 in full of all demands, but the offer was refused.

Mr. *Pearson*, Q.C., and Mr. *Jervis*, for the Plaintiff:—

The question is, whether the wife's separate estate is liable for debts contracted by her before marriage, the husband having become bankrupt and obtained his discharge? It will be said that the debt of the wife became the debt of the husband, and that she is discharged by the discharge of her husband. But it does not follow that her separate estate is not liable in equity. The reason of the rule of law that the wife's debt is, during the coverture, the husband's debt, and that her personal liability is discharged by his bankruptcy, is, that all the wife's property is acquired by the husband, and she has nothing wherewith to pay the debt, and, moreover, that all her property being her husband's is surrendered to the assignee in bankruptcy. But if upon her marriage her property instead of going to the husband is settled to her separate use, the reason for the rule ceases, and it would be most inequitable that the property of a woman who has contracted debts should, by means of a settlement, be taken out of the reach of her creditors. The liability of the wife's separate estate for her debts contracted before marriage is established by the early case of *Biscoe* v. *Kennedy* (1), where the plaintiff having sued the husband and wife for the wife's debt contracted before marriage, and the husband having absconded, the plaintiff proceeded to outlawry, and then filed his bill to be paid out of the wife's separate estate, and obtained a decree. That case has never been questioned, and is cited as an authority in all the text-books. In *Miles* v. *Williams* (2), where it it was held that the debts of the wife *dum sola* are discharged by the bankruptcy of the husband, the judgment assumes that the wife's property is surrendered for the benefit of the creditors; and Lord *Macclesfield* puts the case of a woman being in debt and making over all her effects in trust and then marrying a bankrupt, and says, that that would be a fraudulent conveyance as against

(1) 1 Bro. C. C. 17, n. (2) 1 P. Wms. 249.

creditors *quoad* so much of the estate as would satisfy their debts. The courts of law will not treat a married woman who has separate property as discharged by the bankruptcy of the husband. In *Sparkes* v. *Bell* (1), where a married woman had been taken on a *ca. sa.* on a judgment against her husband and herself for her debt contracted before marriage, an order for her release after her husband had taken the benefit of the Insolvent Acts, was discharged on the ground that she had separate property sufficient to pay the debts. In *Lockwood* v. *Salter* (2), although it was held that the husband's discharge under the Insolvent Acts was a good plea in an action against husband and wife for the wife's debt contracted before marriage, some of the judges admitted that in equity the separate estate of the wife might be liable, and they doubted whether, even at law, a replication that the wife had separate property would not have been good. In *Bonner* v. *Bonner* (3), a fund in Court belonging to a married woman who was indebted before marriage was paid to the husband's assignees in bankruptcy, the debt having been proved in the bankruptcy.

Mr. *Lindley*, for the Defendants:—

The separate estate of a married woman cannot be made liable for a debt which was in its inception a legal debt, and which at law has been extinguished. Courts of Equity enforce against separate property the contracts and engagements entered into by a married woman on the faith of such separate property, because such contracts are purely equitable, and can only be entered into by reason of the married woman being, as to her separate property, treated in equity as a *feme sole*. But a debt contracted by a woman *dum sola* is a legal debt, which was not contracted with reference to separate estate, and upon her marriage it continues to be her legal debt, and also the legal debt of the husband. That such a debt is discharged by the bankruptcy of the husband is clearly settled: *Miles* v. *Williams* (4); *Lockwood* v. *Salter*; *Chitty* on Pleading (5). In *Sparkes* v. *Bell* the wife had been lawfully taken in execution, and it was a question for the discretion of the

(1) 8 B. & C. 1.
(2) 5 B. & Ad. 303.
(3) 17 Beav. 86.
(4) 1 P. Wms. 249.
(5) Vol. i. p. 67.

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Court whether she should be discharged; and in that case the Court appear to have overlooked the fact of the husband's discharge under the Insolvent Acts, and *Patteson*, J., in *Lockwood* v. *Salter* (1), observes, that in *Sparkes* v. *Bell* (2) *Miles* v. *Williams* (3) was not fully considered. In this case no judgment has been, and none can now be, obtained against Mrs. *Stretch*. This is the first time that a Court of Equity has been asked to enforce against separate property a debt of the wife contracted *dum sola* which has been legally discharged by her husband's bankruptcy. The only authority which can be found at all approaching the case is *Biscoe* v. *Kennedy* (4). From the very short report of that case, it is not very clear what was the ground of the decision. It may have been the outlawry of the husband, or there may have been circumstances which rendered the settlement fraudulent; at all events there was no bankruptcy, and the debt was not extinguished. *Biscoe* v. *Kennedy* does not appear to have been followed or commented on in any subsequent case, and is merely cited in the text-books among other cases relating to separate estate. In *America* this question has recently been fully considered in a case of *Vanderheyden* v. *Mallory* (5), and the Court declined to follow *Biscoe* v. *Kennedy*. In *Bonner* v. *Bonner* (6) the question was, whether the equity to a settlement of a wife, whose debts contracted before marriage remained unpaid, should prevail against the assignees in bankruptcy of the husband.

Mr. *Pearson*, in reply:—

Even at law the liability of the separate property is recognised, and the Courts have invariably refused to discharge from custody a married woman taken in execution for debt, unless it is shewn that she has no separate property.

SIR R. MALINS, V.C.:—

This suit raises a point of law of considerable importance, which is said by Mr. *Lindley* to be an entirely new point. It would be

(1) 5 B. & Ad. 303.
(2) 8 B. & C. 1.
(3) 1 P. Wms. 249.
(4) 1 Bro. C. C. 17, n.
(5) 1 Comstock (New York Appeals), 452.
(6) 17 Beav. 86.

very surprising if it were so; but I think that upon looking into the authorities it will not be found altogether new.

The Plaintiff is the public officer of a banking company. The Defendant Mrs. *Stretch*, before her marriage with her present husband, accepted bills of exchange for the accommodation of her brothers, which bills were discounted by and came into the hands of the banking company. In October, 1867, six months after she had accepted the bills, she married Mr. *Stretch*, and having a small property, she executed a marriage settlement by which she reserved an interest in the property for her separate use during the joint lives of herself and her husband. The banking company have brought an action on the bills against the husband and wife; the husband has become bankrupt, and it is not disputed that he is discharged from all liability. The banking company now seek to enforce their debt against the separate interest of Mrs. *Stretch*, reserved to her by the settlement.

The law as to the liability of a husband for the debt of the wife contracted before marriage proceeds upon this principle, that as by the common law the husband takes all the property of the wife, he is liable for her debts. But the husband and wife must be sued jointly for the wife's debt, and if no action is brought during the coverture and the wife survives, she remains just as liable for the debt as she was before the marriage; but if an action is brought and judgment recovered against husband and wife during the coverture, and if the husband becomes bankrupt, and obtains his discharge I am bound to assume from the authorities, and especially Lord *Denman's* judgment in *Lockwood* v. *Salter* (1) and the *dictum* of Lord *Macclesfield* in *Miles* v. *Williams* (2), that the liability of the husband and of the wife for the wife's debt is gone at law. Consequently I must hold in this case that Mrs. *Stretch* as well as her husband is personally discharged from liability at law for this debt. But this bill is founded on the principle that though the wife is personally discharged at law, her property, so far as she takes a separate interest under the settlement, is not discharged from the liability to satisfy her debt. If it were the law that a woman may contract debts having the means to pay them, and then may marry and execute a settlement of her property, reserving it

(1) 5 B. & Ad. 303. (2) 1 P. Wms. 249, 257.

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to her separate use, and that thereby her property is completely absolved from all liability for her debts, it would be very much to be deplored. In my opinion every settlement which takes property out of the reach of the creditors of the settlor savours of fraud. Persons who make a settlement on marriage ought to make proper provision for the payment of their debts, and if they do not make such provision the Court ought to regard the transaction as one which deserves disapprobation. This lady has made a settlement of all her property to her separate use during the joint lives of herself and her husband, and it would be most unjust and inequitable that she should deprive her creditors of the payment of their debt. Is she entitled to do so? There is no question that debts incurred by a married woman may be enforced against her separate estate. It is also perfectly clear that if a man by a marriage settlement reserves a life interest for himself in the settled property, that life interest is liable to his creditors. Why should not the same rule apply to a woman? I think that upon every principle of justice, if a woman reserves a separate interest it should remain liable to her creditors. But there is the technical difficulty that the wife is personally discharged by the bankruptcy of her husband. Does it, however, follow that her property is also discharged? I think that the authorities which have been cited shew that it does not. I will first take the case of *Miles* v. *Williams* (1); there Lord *Macclesfield*, after stating as his opinion that which was subsequently laid down by Lord *Denman*, that by the husband's discharge in bankruptcy the wife will be discharged for ever, proceeds to say, "A case may possibly be put where a woman being in debt may make over all her effects in trust, and then marry a bankrupt, and by that discharge all her debts, and yet preserve her estate; but that would be a fraudulent conveyance as against creditors, *quoad* so much of the estate as would satisfy their debts, and for that they might have remedy." So that he puts this very point, that so far as her property would be sufficient to satisfy her creditors it would be a fraudulent conveyance. Then what is the result of the cases at law? *Sparkes* v. *Bell* (2) is a very strong case, for there the wife having been taken in execution, an order had been obtained for her discharge, and the application was to discharge that

(1) 1 P. Wms. 249, 257. (2) 8 B. & C. 1.

order and bring her back to prison, the husband having in the meantime obtained his discharge as an insolvent debtor; and the Court, on the ground that she had separate property sufficient to pay the debt, actually allowed her to be taken back to prison. In *Lockwood* v. *Salter* (1), although it was decided that the wife was discharged by the discharge of the husband, yet *Patteson*, J., says, speaking of *Sparkes* v. *Bell* (2), "One argument there used was that the wife when taken could not obtain her discharge under the Act, to which effect *Ex parte Deacon* (3) was cited, but without adverting to the 72nd section of 7 Geo. 4, c. 57, which had been passed since that case was decided, and under which she might have applied for her discharge, unless that clause be confined to cases where the husband has not been taken in execution, or being taken will not apply for the benefit of the Act. I do not, however, see any reason for so confining that clause, rather thinking, as at present advised, that it was intended to operate so as to make the separate property of a married woman available to her creditors, and that on that ground the decision in *Sparkes* v. *Bell* may be supported. I do not say what would be the case if to a plea like this it were replied that the wife had separate property." Therefore in that case again the Court of Law recognises the principle that, though the wife is discharged from personal liability, she is bound to make good the debt out of her separate property. Then I come to the early case of *Biscoe* v. *Kennedy* (4):—[His Honour read the case and continued:—] There the first bill was dismissed because the law is that you must first sue the husband and wife jointly, and it is only when you can get nothing from the husband that you are entitled to proceed against the wife's separate estate. There the Plaintiff contended that the settlement was, as to him, fraudulent, and so here I am of opinion that the settlement was as to the banking company fraudulent. It is said by Mr. *Lindley* that *Biscoe* v. *Kennedy* has never been acted upon, and that it is of doubtful authority, and that in *America* it has not been followed. But the American decision does not affect the law of this country; the case is cited without objection in all the text-books, and though, as a general rule, I do not attach much weight to that,

(1) 5 B. & Ad. 303, 312.
(2) 8 B. & C. 1.
(3) 5 B. & A. 759.
(4) 1 Bro. C. C. 17, n.

V.-C. M. 1870 CHUBB v. STRETCH.

yet I think that, considering the importance of the case, it may be assumed that so learned a writer as Mr. *Jacob* would not have cited it without comment in his edition of *Roper* on Husband and Wife (1) if it had been considered doubtful. I am of opinion that it is good law, and I most willingly follow it, considering it to be based on the soundest principles of justice and equity. I must therefore declare that the banking company are entitled to have the separate interest of Mrs. *Stretch* applied in payment of their debt. I regret, considering the small amount of the property, that they did not accept the Defendants' offer of £150, but they had a right to refuse it, and they must have their costs of the suit out of the separate estate. There will be no costs for Mr. and Mrs. *Stretch*, but if the trustee has incurred any separate costs, they must be the first charge on the separate estate.

The Registrar, Mr. *Rogers*, has procured from the Public Record Office, where the Registrars' books, down to 1799 inclusive, are now kept, the following extract from the decree in *Biscoe* v. *Kennedy*:—

Master of the Rolls. July 21, 1762.

BISCOE *v.* KENNEDY.

1761 A., p. 517.

Extract from Decree.

Cur. Declare that under the circumstances of this case the effects of the Defendant *Jane Kennedy*, vested in the Defendant *A. McCulloch* (trustee of the marriage settlement), are to be considered as the property of a *feme sole*, and as such liable in equity to make the Plaintiff satisfaction for so much of the debt contracted by her while *feme sole* as he has not been able to recover by means of the outlawry of *James Kennedy* her husband.

Account of what remains due to Plaintiff and tax his costs of suit, direct payment of debt and costs by sale of the *E. I.* Stock (comprised in the settlement) standing in the names of Defendant *Jane Kennedy* and Defendant *McCulloch*, and liberty to apply.

Solicitors for the Plaintiff: Messrs. *Whitakers & Woolbert.*

Solicitors for the Defendants: Messrs. *Whites, Renard, & Floyd.*

(1) Vol. ii. p. 240.

MARTIN *v.* LAVERTON.

V.-C. M.
1870
Jan. 11, 12.

Devise of Residue—Legal Estate in Mortgage—Intention not to pass Legal Estate.

A testatrix devised and bequeathed all the residue of her property, of whatever description, which she had power to dispose of by will, as follows:—one moiety to be equally divided between her two daughters, and the other moiety she gave to a trustee to be paid in equal shares to her two sons at twenty-five, the shares of children dying under age to go to the survivors, and the trustee to have power to vary the securities and to apply part of the income for the maintenance and education of the children. The testatrix was mortgagee in fee of an estate which was subsequently sold under a power in the mortgage deed, and the purchaser required that the residuary devisees should join in the conveyance:—

Held, that the legal estate in the mortgaged property passed to the heir-at-law of the mortgagee.

BY an indenture of mortgage dated the 16th of July, 1862, in consideration of £5250 advanced by *Renira Henrietta Martin* to *Alfred Haynes*, *Alfred Haynes* granted and assured certain messuages, farm-lands, and other hereditaments, to hold to *R. H. Martin*, her heirs and assigns, for ever, subject to a proviso for redemption, and it was provided that in case default should be made in payment of the £5250, or interest thereon, then it should be lawful for *R. H. Martin*, her heirs or assigns, immediately thereupon, or at any time thereafter, to enter into the possession or receipt of the rents and profits of the messuages, farm, lands, and other hereditaments thereby conveyed; and further, that she or they should or might (whether having previously so entered or not) at any time or times after the expiration of six months from the period of such default, at her or their discretion, absolutely sell or dispose of the same, and that every sale so made by *R. H. Martin*, her heirs or assigns, should be as valid and effectual if *A. Haynes*, his heirs or assigns, should not execute an assent to the same, as it would have been if he had assented to the sale, and that the receipt of *R. H. Martin*, her heirs or assigns, should be a sufficient discharge to any purchaser for the purchase-money.

By an indenture of further charge, an additional sum of £250 was advanced by *R. H. Martin* to *A. Haynes*, upon the same

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security, and it was declared that the power of sale in the mortgage deed should extend and be applicable to the further charge.

Default was made in payment of the mortgage-money, and more than six months had elapsed from the period of such default when *R. H. Martin* made her will, dated the 5th of May, 1865, by which she devised and bequeathed all the residue of her property, of whatever description, which she had power to dispose of by will as follows (that is to say), one moiety thereof to her daughters, *R. H. Martin* and *Lucy Martin*, to be equally divided between them, and the other moiety she gave and bequeathed to her step-son, *George Edward Martin*, his heirs, executors, administrators and assigns, upon trust as to one moiety, for her son *Albert Bentinck Martin*, to be paid to him when he should attain twenty-five years, and as to the other moiety, in trust for her son *Evelyn Charles Martin*, to be paid to him when he should attain twenty-five; and the testatrix directed that it should be lawful for the trustee until the legatees should attain twenty-five, either to permit the premises to remain in their actual state of investment, or at his discretion to sell the same or any part thereof, and invest the net moneys to arise from the sale as he should deem expedient; and the testatrix directed that the trustee thereby appointed should have power to apply such part as he should think fit of the income of the respective shares in the trust moneys for the maintenance and education of *Alfred B. Martin* and *Evelyn C. Martin*: provided always, that if either of her daughters died unmarried before attaining twenty-one years, or if either of the sons died before attaining twenty-five years, then the share of the child so dying, or so much thereof as should not have been advanced, should be divided equally between the survivors, subject to the same trusts and conditions as their original shares; and the testatrix appointed *George Edward Martin* her sole executor.

R. H. Martin, by a codicil to her will, directed that the sum of £450 which she had advanced to her son *Albert B. Martin*, should be deducted from the amount which, by her will, she had left in trust for him, and that such sum should be divided between her two daughters and her son *Evelyn*, one third to each. The testatrix died in January, 1868.

The will and codicil were proved by the Plaintiff *George Edward*

Martin, the executor, and the testatrix left the Plaintiff, *Albert B. Martin*, her eldest son and heir-at-law, her surviving.

The Plaintiffs, acting under the power of sale contained in the indenture of the 16th of July, 1862, caused a portion of the mortgaged property to be put up for sale by auction.

The Defendant became the purchaser of such hereditaments for the sum of £3500.

Upon the delivery of the abstract the Defendant required that the conveying parties should be the residuary devisees of *R. H. Martin*, but the Plaintiffs alleged that the devise of the residue did not pass the legal estate in the property agreed to be sold, and consequently that the conveying parties would only be *George Martin* as executor and *Albert Martin* as heir-at-law of *R. H. Martin*.

The bill prayed specific performance of the agreement.

The Defendant demurred.

Mr. *Cotton*, Q.C., and Mr. *Bush*, in support of the demurrer:—

The Defendant in this case is a willing purchaser, but he is advised that a good title cannot be made without the devisees joining in the conveyance. The point is therefore raised upon demurrer whether the Plaintiff can enforce specific performance; the simple question being, whether the legal estate in the mortgaged property passed under the general devise in the will of *Renira H. Martin*. The words are: "I devise and bequeath all the residue of my property, of whatever description, which I have power to dispose of by will."

There can be no doubt that these words are sufficient to pass the legal estate in the mortgaged premises, and so it has been held by many authorities. It is true that the objects of the testator are to be looked at, but there is nothing in this will inconsistent with the idea of passing the legal estate. In *Thirtle* v. *Vaughan* (1), where a testator died after he had contracted to sell certain freehold property, and had therefore become a trustee for the purchaser, and had by his will made a general devise of his real estate to persons as tenants in common, it was held that the legal estate did not pass; but in that case, it was a dry legal estate, and nothing

(1) 24 L. T. 5.

V.-C. M. 1870 MARTIN v. LAVERTON.

beneficial could pass, and the testator had shewn by a clause of accruer between the devisees that he intended only to pass the property of which he was the beneficial owner: In *In re Morley's Will* (1) the legal estate in trust property was held not to pass under the words "all other my real estate whatsoever;" but this was on the ground that the estates were intended to be sold and to form part of the residuary personal property which was given to two persons as tenants in common.

This is not such a title as the Court can force upon a purchaser. It is not a marketable title: *Pyrke* v. *Waddingham* (2), *Sugden's* Vendors and Purchasers (3); *Knight* v. *Robinson* (4); *In re Stevens' Will* (5).

Mr. *Price*, in support of the bill, was not called upon.

SIR R. MALINS, V.C.:—

In this case, by an indenture dated the 16th of July, 1862, *Alfred Haynes* mortgaged the property in question in this suit, together with other property, unto and to the use of *Renira H. Martin*, her heirs and assigns. That is a mortgage in fee, and the mortgage in fee contains that which is essential to every well framed mortgage, a power of sale; the object being to enable the mortgagee, by means of the property, to realize the amount lent if default is made in payment by the mortgagor.

Renira H. Martin is dead, and the property mortgaged has been sold by her executor. The question now is, where the legal estate in the mortgaged property is: whether it passed by her will or descended to her heir-at-law. If it has passed by her will then the power of sale is annexed to the estate, and having passed by the will part of it is an undivided share which is vested in an infant, and the power of sale, it is said, cannot be exercised. If, on the other hand, the legal estate did not pass by the will then it has descended to the heir-at-law of the testatrix, who is the Plaintiff, *Albert Bentinck Martin*, and he can exercise the power of sale and give a receipt for the purchase-money.

(1) 10 Hare, 293.
(2) Ibid. 1.
(3) 14th Ed. p. 385.
(4) 2 K. & J. 503; 1 Jar. 667, 3rd Ed.
(5) Law Rep. 6 Eq. 597.

Then the sole question is, has this will, or has it not, passed the legal estate in the mortgaged property to the devisees? The general rule is now, I think, sufficiently settled to admit of no doubt whatever, that where the words of a will are sufficiently comprehensive to pass trust estates, mortgaged estates (which are in a certain sense trust estates) will so pass unless there be something in the nature of the devise which makes it inconsistent with such estate passing and shews to the reasonable satisfaction of the Court that the testator is directing his attention to the property of which he was the beneficial owner, and not to that of which he was a mere trustee of the legal estate, subject to the payment of the mortgage-money. The words used in this devise are abundantly sufficient to pass the legal estate in fee, if the trusts and purposes were in no way inconsistent with the mortgaged estate passing. But the question is, whether the trusts or purposes for which this property is given do not clearly shew, as in my opinion they do, that what the testatrix intended was, not to give the dry legal estate which she had as mortgagee, but to give only that of which she was beneficial owner. Here the testatrix devises one moiety to her daughters *Renira Martin* and *Lucy Martin*, to be equally divided between them. That must mean property of which she was the owner, that is, which was her own property. It is to be equally divided; she would not have thought it necessary to divide a dry legal estate in mortgaged property. The other moiety she devises to her stepson *George Edward Martin*, his heirs, executors, administrators, and assigns, to hold upon trust as to one moiety, that is, a moiety of a moiety, of the said trust premises for her son *Albert Bentinck Martin*, to be paid to him on attaining twenty-five years; and as to the other moiety upon trust for her son *Evelyn Charles Martin*, to be paid to him on attaining twenty-five years. Then she gives a power to her trustee to allow the property to remain in its actual state of investment, or at his discretion to sell the same or any part thereof, and invest the proceeds as he should deem expedient; and she also gives the trustee power to raise money for the advancement and preferment of her sons.

Therefore, although the words are general, the subsequent trusts plainly shew that what she was directing attention to was that property which was plainly her own, in which she had a beneficial

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interest. I am clearly of opinion that that was the intention of the testatrix, and these questions always depend upon intention.

In the case of *Lord Braybroke* v. *Inskip* (1), which is the leading authority upon the subject, it was laid down, and the rule always is now, if there is a general devise, that will pass the legal estate in the mortgage or trust estates, provided the trusts or objects of the trusts are not inconsistent with their passing. In that case Lord *Eldon* says: "I know no case which states as the rule that trust estate shall not pass under general words unless an intention that they should pass appears; and I incline to think they will pass unless I can collect from expressions in the will, or purposes or objects of the testator, that he did not mean they should pass." Can I, then, collect here from the expressions that these purposes and objects were strictly and specially limited to the property which the testatrix was the beneficial owner of? I am clearly of opinion that I can.

Mr. *Cotton* relied upon a case, *Knight* v. *Robinson* (2), which is cited in *Jarman*. I have looked at the note by Mr. *Jarman* (3), and I have also looked at the authorities there cited, one of which I have just commented upon. Mr. *Jarman* says: "It should seem that the introduction into the devise of words of severance, or other expressions shewing that the devisees were to take several and not joint estates, will not prevent such devise from operating on estates vested in the testator as mortgagee, though it is usual and convenient in devising such property to make the devisees joint tenants, in order that the entirety may devolve to survivors." My impression is, that directly you get to a tenancy in common, where the legal estate is given to tenants in common, that of itself is a circumstance to shew it is only that property which the testatrix was the owner of that was intended to pass, because there is very great inconvenience in having a trust property or a mortgaged estate devised to several persons as tenants in common, since you have, upon the death of every one, a devolution of shares; whereas if it is a joint tenancy the estate is conveniently dealt with. One authority is sufficient to cite for that proposition. In *In re Vallis* (4), where a mortgagee in fee devised all the residue of his

(1) 8 Ves. 417, 435. (2) 2 K. & J. 503. (3) Vol. i. p. 667, 3rd ed.
(4) Rolls, July 22, 1807; 1 Sand. Uses and Trusts, 359, n.; 1 Jar. 661, 3rd ed.

lands and hereditaments, goods and chattels, mortgages, moneys, securities for money, and all other his real and personal estate, unto *A.*, *B.*, *C.*, and *D.*, to be equally divided between and amongst them as tenants in common, according to the nature of their respective estates, it was held that the legal estates passed to the devisees as tenants in common. Then Mr. *Jarman* adds this: "It will be observed, however, that the devise in this case contained the words 'mortgages' and 'securities for money,' which, in some recent cases, presently noticed, have been held to be sufficient, with a very slight aid from the context, to pass the legal as well as the beneficial interest in mortgages. Whether the occurrence of these words had any weight in the decision just stated does not appear." It appears to me plainly they had very great weight, because in this case, if the testator had said, "I devise all the estate vested in me as mortgagee," it would be impossible to get over the force of those words; pass they must, however inconvenient it might be. But there the testator says, "I devise all mortgages, moneys, and securities for money, and all other real and personal estate." Those are words that always pass mortgaged estates. They are expressly devised.

I was not before aware of the case of *Thirtle* v. *Vaughan* (1). It was decided by Vice-Chancellor *Wood;* and the very same point arose in that case as here. It was not a mortgaged estate. The testator had contracted to sell his real estate, and so he was a mere trustee of the legal estate; and before the completion of the contract the vendor died, having, by his will, made a general devise of his real estate to his three children as tenants in common, with a proviso that if any of them should die under the age of twenty-one without leaving issue, then, as well as to the respective estates and interests and shares to which any such child or children so dying would otherwise have been entitled under any of the devises therein contained, as to any accruing share or interest therein, they should go over to the others or other of them, and if more than one, as tenants in common. Two of the devisees were infants, and one of the infants was also the heir-at-law of the testator. In order to procure a conveyance of the legal estate in the property to the purchaser who had accepted the title, it became

(1) 24 L. T. 5.

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necessary to obtain a decree for specific performance of the contract, and a declaration in whom that legal estate was vested, the question being whether it had descended on the heir-at-law, or whether the words of the will were sufficient to carry the trust estates to the devisees. It is the very case that I have now before me upon a very similar clause. The simple question was, whether it passed by will or descended as undisposed of. Vice-Chancellor *Wood* said he thought that this case was distinguishable from those where it had been decided that the fact of a general devise made to persons as tenants in common was not of itself enough to prevent trust estates passing under that devise, because here there was the additional clause providing for the accruer of the shares in certain events. The wording of that clause was so peculiar that it seemed almost impossible to come to any other conclusion than that the testator was referring to beneficial interests only. His Honour said he felt himself obliged to hold that the legal estate contracted to be sold by Mr. *Thomas Watts Palmer* did not pass by this devise in his will, and that it had descended upon his heir-at-law, who would, therefore, be declared a trustee for the purchaser. There were other cases cited, but I believe they have no particular application to the point. The case of *In re Stevens* (1) was a very simple case; it decides that securities for money always pass mortgaged estates.

Now, therefore, as it was decided in the case before Vice-Chancellor *Wood*, and as Lord *Eldon* decided in *Lord Braybroke* v. *Inskip* (2), that the purposes for which the property was devised were inconsistent with the application of anything of which the testator was not the beneficial owner, I distinctly and clearly come to the conclusion, upon principle and authority, that this is a case in which the legal estate did not pass by the general devise, but has passed to the heir-at-law. The consequence of that will be that the heir-at-law will be able to exercise the power of sale, and convey the legal estate to the purchaser.

With regard to the suggestion of the mortgagor not being bound, I am not making a decree now; I am merely deciding whether this demurrer shall be allowed or overruled. The question of the

(1) Law Rep. 6 Eq. 597. (2) 8 Ves. 417.

decree for specific performance will be a question at the hearing of the cause. I therefore overrule the demurrer.

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Solicitors for the Defendant: Messrs. *Warry, Robins, & Burgess.*
Solicitors for the Plaintiff: Messrs. *Hird & Son.*

CHETHAM *v.* HOARE.

V.-C. M. 1870 *Feb.* 9, 10.

Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 26—*Concealed Fraud—Reasonable Diligence.*

The Plaintiff sued to recover property to which his predecessor, as he alleged, became entitled in the year 1769, and insisted that a register book containing a certificate of marriage, forming the principal link in his title, had been fraudulently mutilated in order to prevent him or his ancestors from obtaining evidence of the marriage:—

Held, upon demurrer, that, by reasonable diligence, evidence of the marriage might have been ascertained within twenty years after the alleged fraud had been committed; and that the Plaintiff had not brought his case within the 26th section of the *Statute of Limitations*.

Semble, that an ejectment bill may properly be filed in this Court under the 26th section upon the ground of fraud.

THIS was a bill filed by *James Chetham*, suing *in formâ pauperis*, to recover possession of estates worth about half a million of money which had been in the possession of the Defendants and their ancestors for 149 years.

The bill alleged that the Plaintiff was entitled as issue in tail under certain entails created by settlements in the early part of the last century, and that the ancestors of the Plaintiff became so entitled in the year 1769 upon the death of *Edward Chetham*, counsellor-at-law. That the ancestors of the Plaintiff and the Plaintiff himself had on various occasions used their utmost endeavours to make out their title to the estate, but that they had been unable to obtain proof of the marriage of *Timothy Chetham* with *Hannah Ashton*, through whom they claimed, and that the certificate of such marriage had been destroyed by the said *Edward Chetham*. That the father of the Plaintiff, who would now have been entitled to the estates had he lived, died in the year 1863, whereupon the Plaintiff began anew the search of various parish registers to endea-

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vour to discover evidence of the aforesaid marriage of *Timothy Chetham* and *Hannah Ashton*, and in the month of March, 1868, visited the diocesan registry of the city of *Chester*, and, after searching the parchment returns or transcripts of the registers of many of the older churches of *Manchester* and its neighbourhood, left the office without discovering such registry, but afterwards returning for some article he had forgotten, the clerk in charge of the registry suggested to the Plaintiff the search of an ancient index to licensed marriages (very little known even to antiquaries), when Plaintiff discovered therein the name of *Timothy Chetham* and the number of the marriage return or register transcript made in the year 1725, which was, after considerable difficulty, found in the said registry, and contained a record of the marriage of the said *Timothy Chetham* to *Hannah Ashton* on the 21st of November, 1724, in the church of the *Holy Trinity*, in *Selford*. That on a minute examination of the said index book to licensed marriages it appeared that the page on which the entry had been made had on some occasion been pasted or gummed, or with some adhesive matter so fastened to the opposite page thereof, that on any ordinary diligent examination thereof the adhering pages would be passed over by any person searching the same, and thus the existence of the return of the marriage to the said registry office would remain undiscovered. The Plaintiff immediately afterwards returned to *Manchester*, and went to the church of the *Holy Trinity*, and on examination of the register book of marriages of that church for the year 1724, from which the return at the registry at *Chester* had been copied, he discovered that a whole leaf of the register book, containing the entry of marriages for the year 1724, had been carefully torn out of the register book, and that there was no trace of any entry of the marriage of *Timothy Chetham* and *Hannah Ashton* therein, and, moreover, the register book appeared to have had the original numbers thereof altered at the early part or middle of the last century, and that, on a further examination with a microscope, parts of the original figures therein written could be discovered, and the same register book had, to all appearance, in other respects been unlawfully tampered with. The Plaintiff also alleged that various returns or transcripts from the ancient entries in the burial registers of the collegiate church

of *Manchester* relating to the burial of several of his ancestors were deposited in the diocesan registry, but that such entries in the burial registers themselves were not now to be found, such burial registers having, in fact, also been mutilated during the middle or early part of the last century, but the Plaintiff had no evidence to shew that the said *Edward Chetham*, counsellor-at-law, committed such mutilations as aforesaid. The Plaintiff then alleged that such mutilations, erasures, and tampering with the index book and register books had been effected with the fraudulent intention of preventing the Plaintiff and his ancestors from succeeding to the hereditaments comprised in the before-mentioned indentures, as he and they were entitled to do under and by virtue of the several entails thereof. That the Plaintiff, on making the discoveries aforesaid, made divers representations of the same to the Defendants, who were now respectively seised or possessed of the before-mentioned hereditaments, but had been unable to obtain from them any satisfaction.

The bill charged that, by reason of the discovery within the last twenty years of the said concealed frauds, the Plaintiff was in equity not barred by the present or former Statutes of Limitations from instituting this suit; and it prayed that the Plaintiff might be declared the heir in tail under and by virtue of all the before-mentioned indentures of settlement of and to all the hereditaments mentioned in the will of *Humphrey*, the founder, and might be put into the seisin and possession thereof accordingly.

The bill also prayed an account and the appointment of a receiver of the estates.

To this bill two demurrers were put in on the ground that the Plaintiff's claim was barred by the *Statute of Limitations*.

Mr. *Glasse*, Q.C., and Mr. *Wickens*, in support of the first demurrer:—

This bill is founded on the 26th section of the *Statute of Limitations* (3 & 4 Will. 4, c. 27,) which enacts "that in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud

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shall, or with reasonable diligence might have been first known or discovered." In this case, if there had been any fraud it might have been discovered long ago, and within twenty years after its commission. It would tend to shake the titles of numberless persons if such an attempt as this were to succeed; where the defendants have been in possession for 149 years. Even if it were true that the certificate of the marriage had been torn out of the register book, that fact might have been ascertained by any of those persons who the plaintiff alleges were engaged in searching the register books; but there were other modes of proving the marriage at that time, which are not alleged to have been put in force. There is no case of trusteeship here, but even if there had been an express trust those claiming under the settlements could set up the statute: *Petre* v. *Petre* (1).

Mr. *Cotton*, Q.C., and Mr. *Charles Hall*, for the second demurrer.

Mr. *Cole*, Q.C., Mr. *Morgan*, Q.C., and Mr. *Edmund S. Ford*, in support of the bill:—

It is upon the ground of fraud that we now seek to set up this claim, and by the 26th section of the statute, no time will run in such a case. In *Trevelyan* v. *Charter* (2) Lord *Cottenham*, then Master of the Rolls, made use of this strong expression: "It is fitting that those who thus appropriate the property of others should be assured that in this Court no time will secure to them the fruits of their dishonesty, but that their children's children will be compelled to restore the property of which their ancestors have fraudulently possessed themselves. Time is no bar, except the party having full information of his injuries and rights allows time to elapse without seeking relief." In that case a person was held not to have lost his right after a lapse of forty-seven years since the fraudulent circumstances took place. The allegation here is that one *Edward Chetham*, a counsellor-at-law, knowing full well that every pedigree depends upon one great link in a title, contrived to destroy that link, and thereby obliterate the evidence by which an adverse claim could be established. It must be admitted as alleged in the bill, that the register book was mutilated and tampered

(1) 1 Drew. 371. (2) 4 L. J. (Ch.) 209.

with, and that that was done to prevent the Plaintiff or his ancestors from supporting their title. It is evident, from the care taken in effecting the fraud, that it could not be discovered without more than ordinary cleverness and diligence. The Plaintiff by unusual perseverance has at length procured evidence of the fraud which was perpetrated, and on the ground of that fraud he is entitled to succeed.

The VICE-CHANCELLOR suggested whether the Plaintiff was entitled to file an ejectment bill in this Court.

Mr. *Cole*:—The Plaintiff is without remedy at law, by reason of the *Statute of Limitations*, and is entitled to come into equity on the ground of fraud, under the 26th section of the statute: *Blair* v. *Bromley* (1).

SIR R. MALINS, V.C.:—

These demurrers raise points of importance to the public which can hardly be over-estimated; and as I think there are questions which ought to admit of no doubt whatever, I do not call upon the counsel for the Defendants to reply to the arguments which have been addressed to me on behalf of the Plaintiff, because I consider that the case made by this bill is wholly unsustainable. The Plaintiff, *James Chetham*, alleges by his bill that he is the issue in tail to very large estates in the counties of *Lancaster* and *York*, which are stated to be of the value of not less than £500,000.

This is a bill to recover the possession of those estates, to which he says he is entitled as issue in tail, under certain entails created in the early part of the last century. If he is entitled to these estates at all, those under whom he claims, that is, his predecessors in title as issue in tail, became entitled to them in possession in 1769, rather more than a century before this bill was filed.

The proposition that a bill can be maintained to recover possession of land, the title to which accrued more than a century before it is filed, is, I must say, a very alarming one, and tends to shake the security of property in this country, if entertained by this Court, to a very alarming extent. But there is no doubt if the Plaintiff brings himself within the protection of the law, however great the

(1) 2 Ph. 354.

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length of time may be, he is entitled to recover upon the strength of that title which the law has conferred upon him. I had occasion to go into this question lately in the case of *Walters* v. *Webb* (1), which is now under appeal. I there expressed the opinion that the object of the *Statute of Limitations* (3 & 4 Will. 4, c. 27) is to make the time, twenty years, a conclusive bar to all rights to land, that a person who claims land, whether it is by an action of ejectment, or by an equitable title, by virtue of proceedings in this Court, must prove that he or those under whom he claims have been in possession within twenty years, or that enlarged period which is given upon the existence of disabilities, in no case exceeding forty years, from the time when the right to possession accrued. Here the Plaintiff alleges that his right of possession accrued, as I have said, in 1769. This is, therefore, a bill to recover land in this Court after the lapse of more than a century from the right accruing. Now that, upon general principles, of course is admitted to be wholly unsustainable.

The Plaintiff puts his case on the 26th section of the *Statute of Limitations*, which enacts: "That in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered." Upon this section a question is raised, and I suggested this morning whether it was not a fatal objection to this bill that it is an ejectment bill. Considering the suggestions made by Mr. *Cole* in answer to my question, I am at present, at all events, inclined to think, but am not absolutely of that opinion, that the proper interpretation of this section is, that where the title of the Plaintiff to recover depends upon fraud, the meaning is, that the suit can be maintained in this Court; and that this is the proper Court in which to maintain the suit, where, if it had not been for lapse of time, it would have been by ejectment, but being beyond the time allowed for ejectment, it is brought into this Court in consequence of the fraud. I do not think, therefore, that the objection can be sustained to this bill,

(1) Law Rep. 9 Eq. 83; since affirmed on appeal.

that it is merely an ejectment bill, because it is founded on fraud, and therefore, I think, is properly brought within the 26th section.

I think it of very great importance that this section, which in its widest extent would give the right of recovering the possession of land at any time whatever (in this case it is one century, and upon the arguments I have heard it might just as well have been after five centuries), should in the interests of society receive the very strictest interpretation. That being so, a person who comes after the expiration of that period which is allowed by the general law under this section, seeking to deprive others of those rights, which they have enjoyed for a long time, in the possession of land, should be bound to prove that he falls strictly and literally within the exception the benefit of which is given to him by this statute. In the case of concealed fraud, undoubtedly, the twenty years does not bar, because the time is to run from when the fraud is not merely discovered, but when by reasonable diligence it might have been discovered.

Now, what is the fraud that is relied upon in this case as giving the right of recovering this land? The right of the Plaintiff depends solely upon the question of the fact of a marriage which is said by this bill to have taken place in the year 1724. If the marriage of 1724 could be proved, then, instead of the property going over in 1769 upon the death of *Edward Chetham*, who is designated in the bill as "counsellor-at-law," to the heirs-at-law of *Edward Chetham*, it would have gone to persons under whom the Plaintiff claims as issue in tail.

What is due diligence to prove? The fact of that marriage. Can I give sanction to the proposition that due diligence has been used to prove a marriage taking place in 1724, when there is no evidence to prove it until 1868? What does it depend upon? It is said that certain registers were mutilated, and it is said that an index of the names of persons married in 1724 was gummed up or stuck together so that you could not discover them. According to the allegations of this bill, it was not by diligence but by accident that this discovery was at last made. What, then, is the due diligence? There are various modes of proving a marriage. It is not necessary in all cases to produce a certificate of marriage

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or of the register; in those times, especially, the great majority of marriages were proved without them, as the registers are known to have been very imperfect; reputation in the family that the marriage took place, that the parties had lived together as husband and wife and were so received, would have been sufficient.

Therefore, unless I can come to the conclusion that no diligence could have proved the existence of this marriage before 1850, that is, 125 years after it took place, I am bound to allow these demurrers. I do not go into the questions whether the allegations are sufficiently distinct, for in the view that I take of the case, that is perfectly immaterial, but considering that the Plaintiff's case rests wholly on the fact of the want of proof of the marriage in 1724, I am bound to come to the conclusion that by reasonable diligence they might have been discovered many years before, and with much greater probability could have been discovered shortly after the marriage took place than now. I come without the slightest hesitation to the conclusion that the Plaintiff does not bring himself within the protection of the 26th section; that even if the allegation of fraud, namely, concealment of that marriage, which is stated in the bill had been proved, yet there is absence of that reasonable diligence by which the fraud might have been discovered at an earlier period. Upon every principle, therefore, I must allow these demurrers. As the Plaintiff sues in *formâ pauperis*, the Defendant will not be entitled to costs.

Solicitors for the Plaintiff: Messrs. *Shaw & Tremellen.*
Solicitor for the Defendant: Mr. *E. Byrne.*

CAMPBELL *v.* MAYOR AND CORPORATION OF LIVERPOOL.

V.-C. M. 1870 Feb. 10.

Liverpool Improvement Act—Ground dedicated to Burials—Reverter of Fee Simple—Notice to treat—Lands Clauses Act.

By an Act of Will. 3, certain land belonging to the parish of *Liverpool* was set apart and dedicated to the use of a burial-ground, and by the sentence of consecration the corporation renounced all right to the land. In 1854 the ground was closed against burials by an Order in Council. In 1866 the corporation, being authorized to take a portion of the burial-ground under the *Liverpool Improvement Act*, served upon the rector, ordinary, and patron of the parish the usual notice to treat, and upon a reference to arbitration a sum of money was awarded for compensation. The corporation subsequently refused to pay, upon the ground that the fee simple of the land reverted to the corporation upon its being closed against burials, and the use for which it was dedicated having come to an end:—

Held, that by the Act of Parliament, followed by the sentence of consecration, the land was dedicated for ever to the use of a burial-ground, and there was no reverter of the fee to the corporation; that, if necessary, the Court would presume a conveyance of the legal estate by the corporation:

Held also, that the notice to treat, and reference to arbitration, left the question of title open.

BY an Act of 10 & 11 Will. 3, it was enacted, that the town and township and liberties of *Liverpool* should for ever be a distinct parish of itself, and be called by the name of the parish of *Liverpool*, and that it should be lawful for the inhabitants of the said town and liberty of *Liverpool* to erect and build a new church in some convenient place to be provided by the mayor and aldermen for the time being, and to provide and inclose a cemetery, churchyard, or burying place about the same. And it was enacted, that the said church and the ground thereunto belonging to be inclosed and used for a cemetery or churchyard should be the parish church or churchyard of the said parish of *Liverpool*, and the same was thereby enacted and declared to be for ever separated and dedicated to the service of God, and to be applied to the use and behoof of the inhabitants of the said town and liberty. The new church was accordingly shortly afterwards built, and a cemetery or churchyard around the same was provided and inclosed. In 1704 the church was consecrated under the name of *St. Peter's*

See as to right to minerals Ex parte Rector of Liverpool 26 W R Eq 15. 16, 18.

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Church, and by the sentence of consecration the corporation renounced all right and title to the churchyard, which was thenceforth used as a burial ground until, by an Order in Council of the 7th of April, 1854, made in pursuance of an Act of Parliament which enabled the Queen in Council to make orders to close burial-grounds in large towns and inhabited districts, this ground was closed as a place of burial.

By the *Liverpool Improvement Act*, 1864 (incorporating the Lands Clauses Act), which was an Act to authorize the construction of new and the widening and altering of existing streets in *Liverpool*, and for making other improvements in the borough, the Corporation of *Liverpool* were authorized to take, among other pieces of land, a part of *St. Peter's Churchyard* for the formation of a street, and accordingly on the 10th of February, 1866, they served on the Plaintiff, who was then the incumbent of the church, and on the ordinary and patron, the usual notice to treat. The Plaintiff then gave notice to the corporation that he was seised, as rector of the church, of the piece of land proposed to be taken, and made a claim for compensation. The question of compensation was, by agreement, referred to Mr. *Manisty*, as arbitrator, who awarded the sum of £5500, less a sum of £350, the cost of new church gates and rails, which were to be put up by the corporation. The corporation subsequently refused to pay the compensation money, on the ground that, upon the making of the Order in Council prohibiting future burials, there was a reverter to them of the churchyard. The Plaintiff then instituted this suit, praying that the corporation might be ordered to complete the purchase, and to pay into Court the purchase-money and the costs of the arbitration, amounting to £706 1s. 8*d.*, less the sum awarded in respect of the church gates and rails.

Mr. *Cotton*, Q.C., Mr. *Wickens*, and Mr. *Charles Stewart*, for the Plaintiff:—

At the time the Act passed enabling the corporation to take this land it was dedicated for ever to the use of the parish as a burial-ground, and by the act of consecration the corporation renounced all right and title to the ground. This took place in the year 1704, and, although there is no evidence of any convey-

ance having been executed by the corporation, the Court will, after so long a period, presume that there was a grant of the fee simple. If there had been no Order in Council for closing this burial-ground, then, according to the decision of Vice-Chancellor *Wood* in *In re St. Pancras Burial Ground* (1), there would have been no question as to the right of the Plaintiff to have this compensation money invested, in order that the vicar for the time being might not be deprived of the income derived from the fees payable in respect of burials. Does, then, the order for closing the ground make any difference in the Plaintiff's right? It is true that there could be no fees arising while the ground was closed, but the Order in Council only prevented the use of the burying-ground for such time as circumstances might require. It might, therefore, have been at some future period used again for the same purpose, and, at all events, it might have been used by all such persons as should have had a right of interment in any vaults upon the granting of a license from the Secretary of State; consequently the right of interment was not annulled by the Order in Council, but only held in abeyance, and made subject to such conditions and restrictions as the Secretary of State might deem expedient. The fee simple of this land was actually vested in the vicar of the church for the time being, and under no circumstances can the corporation claim a reverter, since they were parties to the original grant of that land. According to the decision in the *St. Pancras Case*, the money paid for this land would become subject to the same trusts as the land itself was, and the interest should be received by the same person who before received the fees. In the case of *Champneys* v. *Arrowsmith* (2) it was held that the freehold of the burial-ground in *St. Pancras*, which was closed for burial purposes, still remained vested in the vicar of the parish.

The Defendants, by giving notice to treat under their Act, and proceeding to arbitration under the *Lands Clauses Act*, have, in fact, admitted the Plaintiff's title. It is evident that they would not have served the notice if they had had any claim to the reversion of the land.

(1) Law Rep. 3 Eq. 173. (2) Law Rep. 3 C. P. 107.

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Sir *Roundell Palmer*, Q.C., and Mr. *Freeling*, for the Defendants:—

The Corporation of *Liverpool* have to discharge a public duty in this case, and, as representing the ratepayers, they cannot waive any right they may have in this land. It is for the Court, therefore, to decide whether they are entitled or not. The object of this suit is to ascertain who is entitled as between the Plaintiff and the corporation, leaving the question undetermined what is to be done with the money in case the Court should decide in favour of the Plaintiff.

In giving the common notice to treat under the *Lands Clauses Act*, the corporation made no admission of the Plaintiff's title. It was simply addressed to such persons as might claim any title or interest, and left the question of title entirely open. The notice to treat is only intended to meet a claim not admitted. In *East and West India Docks Company* v. *Gattke* (1) it was decided, that by summoning a jury to assess the amount of compensation claimed by a party under the *Lands Clauses Act*, the company was not precluded from questioning the right of the claimant to compensation. The same principle was acted upon in *Ex parte Cooper* (2). The reference to arbitration, therefore, was no waiver of the defendant's rights.

This land was originally vested in the Corporation of *Liverpool*. When the Act of Will. 3 was passed, enabling the parish of *Liverpool* to build a church and provide a churchyard, the corporation merely dedicated this land for the particular purpose for which it was required, namely, the making of a burial-ground; but the legal estate in the land remained in the corporation. It is believed that the ground was originally a piece of waste land belonging to the parish, and that now, the object for which it has been used being at an end, it is just that it should return to the parish. There is no evidence whatever that a conveyance of the legal estate was ever executed, and the Court cannot presume such a conveyance, for there is no person by whom the conveyance could have been made. We have evidence that a search has been made, and no conveyance can be found, nor is there any deed of dedi-

(1) 3 Mac. & G. 155.

(2) 2 Dr. & Sm. 312.

cation to be found. It is a document, which, if it ever existed, would have been registered in the county. When the burial-ground was closed by the Order in Council, and was no longer used for the purpose for which it was dedicated, the legal estate reverted to the corporation, and they have a right to use it for the benefit of the town. The Act of Parliament enabling the corporation to make new streets gives them power to use this land for improving the town, but they have no right to pay compensation for what is vested in themselves. The land was the freehold of the corporation, and never ceased to be so, although the right of burial was allowed so long as it was required. The effect of the *Liverpool Improvement Act* is to dedicate the land to the use of the living instead of the dead, who require it no longer.

The source of profit which existed while the burials were being performed, has now ceased to exist, and as no more fees could be paid after the burial-ground was closed, there is now no income for which the rector can claim compensation.

SIR R. MALINS, V.-C.:—

This is a bill filed by the Rev. *Augustus Campbell*, who is the rector of the parish of *Liverpool*, and the object of the suit is to compel specific performance of a contract arising out of a notice to treat to take certain land at *Liverpool* forming part of the churchyard or burial-ground of *St. Peter's* parish, the only parish, as I understand, of that town. The bill raises a question of property. The case has been brought before the Court by the corporation purely as a matter of duty, to ascertain whether they are or are not bound to pay for this ground. In that spirit it has been argued, and in that spirit it is that I intend to decide the question between the parties.

[His Honour then referred to the Act of Parliament enabling the town of *Liverpool* to build a new church and provide a burying-ground.]

Now, the parish being in possession of the land, it is contended on the part of the corporation that there was no conveyance of the legal estate, that the legal estate remained in the corporation, and therefore, though this land was dedicated for ever to the use of the inhabitants, that is as a burial ground, yet when by subse-

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quent events it ceased to be used for that purpose, it is said there was a reverter to the corporation, which right of reversion is fallen into possession, and that they are now entitled to take back the land, the purpose for which it was originally dedicated having come to an end. It was further contended, that there could be no ground for holding that the legal estate ever passed from the corporation, but I am unable to accede to that view, because the property having been put in possession of the parish; having been dedicated for this particular and important purpose; and the corporation having by the act of dedication renounced all their right in the land; if it were necessary for the purpose, which I think it is not, the Court would be bound to presume a conveyance of the legal estate, and the evidence of one witness saying that no such deed was ever executed, would not be admissible. At all events, the parish being in possession of the ground, this act of dedication by which they renounced entirely all right in the land operated as a release, and, in my opinion, precluded the corporation from ever afterwards claiming any right whatever in this land. So matters remained until the year 1854, when, in pursuance of the Act of Parliament which enabled the Queen in Council to make orders to close burial-grounds in large towns and inhabited districts, an order was made for closing this burial-ground. It was said there were some technical difficulties, and that that order was not carried into effect until a later period, but I think it may be treated for all purposes as if it were an effectual Order in Council of 1854. In 1854, then, it ceased to be used as a burial-ground—that is, for the interment of bodies thereafter; but it did not cease to be used as a burial-ground, because it was still the depository of the bodies which had been buried previously. Therefore it remained severed, still a burial-ground, and according to the view of the Lord Chancellor, when Vice-Chancellor, in the case of the *St. Pancras Burial Ground* (1), the order is not necessarily a final order. Circumstances might have changed, and the right of burial, or of particular burials, might still have existed in this ground. From the year 1854, therefore, until the passing of the particular Act now giving rise to this question, namely, the Act of 1864, which was an Act to

(1) Law Rep. 3 Eq. 173.

authorize the construction of new and widening and altering of existing streets, and other improvements in the borough of *Liverpool*, and for other purposes, this remained as a burial-ground. Then this Act of 1864 gives an express power to the Corporation of *Liverpool* to take certain lands, and among those lands part of this burial-ground; it is scheduled, and there has been no question raised that they had the strict Parliamentary power of taking this land. Accordingly, having the power to take the land, the ordinary notice to treat is served upon the parish—that is, upon the patron, the ordinary, and the incumbent, who were the proper parties in such a matter. It is contended, on the part of the Plaintiffs, that the giving that notice was an admission that the property was property which must be paid for. I was at first somewhat struck with that view of the case; but upon further consideration I think it was merely a precautionary measure, a measure which I think it would have been well for the corporation to have avoided taking, because I think they might at that time, instead of giving that notice to treat, have raised the question and saved all further trouble, by either filing a bill for an injunction to restrain any proceedings to compel them to ascertain the value of the land, or by taking the land, leaving the other parties to take whatever steps they thought fit. However, a fair view of that matter seems to have been taken throughout, and I think that the notice to treat left the question open, whether the parish was entitled to receive compensation or not, as also did the proceedings before Mr. *Manisty*, where it is quite clear that the question was left to be ascertained. Then this Act of Parliament enables them to take this land. Does it give them the power of taking it without paying for it? The only clause relied upon, on that part of the case, is the 9th, which states: "And whereas it is proposed to appropriate to the purposes of this Act a portion of the land and premises forming the cemetery or burial-ground adjoining *St. Peter's* Church, in the parish of *Liverpool*, which cemetery or burial-ground has, by an Order in Council, been discontinued as a place of interment; and it is expedient that provision should be made for the proper and decent removal and re-interment of any body which may have been interred in the portion of the said cemetery or burial-ground so proposed to be appropriated, or

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which may have been interred in any grave or vault interfered with in the execution of this Act." The obvious intention of this section is simply to provide for the removal of the bodies. It does not say that the land is to be appropriated without payment, but it is to be appropriated, in other words, it is to be taken for the purpose of widening or enlarging the streets; it leaves the question, therefore, entirely where it was.

Upon the whole case, therefore, it appears to me that the effect of the Act of Will. 3, followed as it was by the act of consecration, did for ever exclude the corporation from any right in this land; that it was to all intents and purposes as absolutely, as in the *St. Pancras Case* (1), vested in the parish; and though it is difficult to see what is to be done with the money, yet I am clearly of opinion upon the proper construction of these Acts of Parliament, that the corporation have no right to take the land back again; that there was no right of reverter to them; that they had no interest in the land, and that they must, as regards this land, be treated as strangers, having no more right in it than in any other land, and being bound to take it under the Act of Parliament. Therefore I am of opinion that the decree must be in substance according to the prayer of the bill.

It was then ordered that the sum of £5150, being the amount awarded for compensation, less £350 for the church gates and rails, with interest at £5 per cent. from the 20th of January, 1868, should be paid into Court under the *Lands Clauses Act*, and the Defendants were ordered to pay the costs of the arbitration and the costs of the suit.

Solicitors for the Plaintiff: Messrs. *Field, Roscoe, & Co.*
Solicitors for the Defendants: Messrs. *Torr, Janeway, & Tagart.*

(1) Law Rep. 3 Eq. 173.

In re MORGAN'S SETTLED ESTATES.

V.-C. M.

1870

Feb. 26:
March 14.

Practice—Leases and Sales of Settled Estates Act (19 & 20 *Vict. c.* 120) *ss.* 23, 25 *—Payment of Proceeds of Sale to Trustees.*

Where lands settled in trust for the separate use of a married woman for life without power of anticipation, and after her death in trust for sale, were, in the lifetime of the tenant for life, ordered to be sold under the *Leases and Sales of Settled Estates Act*, the proceeds of the sale were ordered to be paid to the trustees of the settlement, to be held upon the trusts declared of purchase-money by the settlement.

THIS was a Petition for a sale under the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120).

By a settlement the lands proposed to be sold were conveyed to trustees, upon trust, for the separate use of *Matilda Hurst* (a married woman) for life, without power of anticipation, and after her death upon trust to sell the lands, and invest the proceeds in the names of the trustees, in the parliamentary stocks or public funds of *Great Britain*, or upon Government or real securities in *England* or *Wales*, or upon the stocks, funds, shares, loan-notes, debentures, mortgages, or securities of any company incorporated by Act of Parliament, and hold the trust funds in trust for the children of Mrs. *Hurst*.

The Petition prayed that the moneys to be received on the sale might be paid to the trustees, to be held by them upon the trusts declared by the settlement of the purchase-money to arise from the sale of the land, and on the 17th of December, 1869, Vice-Chancellor *Malins* made the order in the terms of the prayer; but the Registrar, in drawing up the order, considered that the 23rd and 25th sections of the Act required that the order should direct the trustees to apply the money to one or more of the purposes mentioned in the 23rd section, and in the meantime to invest it in Exchequer Bills or Bank £3 per Cent. Annuities, and apply the dividends upon the trusts declared of the rents of the land.

Feb. 26. Mr. *Graham Hastings* now mentioned the matter to the Court, and asked that the order might be drawn up as pro-

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nounced. The order merely accelerated the trust for sale, and the 25th section of the Act only applied where the money was paid into Court. In *Wall* v. *Hall* (1), Vice-Chancellor *Kindersley* allowed the money received on a sale under the Act to be invested on mortgage.

SIR R. MALINS, V.C.:—

The object of the Act is to supply a power of sale where the settlement does not contain it, and to provide that the money shall be applied as it would be applied under a proper power of sale. In this case the settlement contains a trust for sale, and provides for the application of the purchase-money. The order, therefore, is quite right, and the money must be paid to the trustees to be held upon the trusts of the settlement.

March 14. Mr. *Hastings* again mentioned the matter, and said that the Registrar still doubted whether the order was in accordance with the Act.

SIR R. MALINS, V.C., after consulting with the Registrar, adhered to his decision.

Solicitors: Messrs. *Scott & Co.*

(1) 11 W. R. 298.

In re HERCULES INSURANCE COMPANY.

V.-C. M.
1870
Jan. 27.

LOWE'S CASE.

Registration of Transfer—Improper Delay—Rectification of the Register—Companies Act, 1862, *s.* 35.

L. transferred thirty shares in the company to *S.*, and the transfer was left at the office of the company for registration on the 5th of January, at which time three petitions had been presented for winding up; but the winding-up did not actually take place till the 3rd of February, when a previous resolution was confirmed by the company for winding up voluntarily under supervision. The weekly board meeting of the directors took place three days after the transfer was left at the office, but the directors had not registered the transfer when the winding-up commenced, and *L.*'s name was placed on the list of shareholders:—

Held, that there had been improper delay in registration, and *L.*'s name must be taken off the register.

THIS was an adjourned summons on the application of *John Lowe* that the register of shareholders of the *Hercules Insurance Company, Limited*, might be rectified by striking out his name from such register as the holder of fifty shares in the company, and by inserting the name of *Wm. Strange* on the register as a shareholder in respect of such shares.

On the 8th of December, 1868, *Lowe* sold by auction at the open *Stock Exchange* fifty shares, part of seventy shares then held by him in the company, and *Wm. Strange* became the purchaser of such fifty shares at the price of 12*s.* per share.

On the 10th of December the certificates of the shares were left by Mr. *Lowe* at the open *Stock Exchange* for delivery to the purchaser. The transfer of the shares was signed by Mr. *Lowe* on the 20th of December, and the money was paid to him. The purchaser, Mr. *Strange*, who was then a holder of other shares in the company, executed the transfer, and it was sent in for registration on the 5th of January. A re-transfer to one *Thomas Colbeck* was also sent in before the 8th of January. On the 5th of January notices appeared in the public newspapers to the effect that petitions had been presented for the purpose of obtaining a compulsory winding-up of the company. On the 7th of January Mr. *Lowe* wrote

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to the secretary of the company to know why he had not received a notice that the transfer of his shares had been registered. On the same day a notice was sent to the shareholders in the company calling a special meeting for the 18th of January to consider the propriety of winding up the company voluntarily. On the 13th of January Mr. *Lowe*, not having received any answer from the company to his letter of the 7th of January, wrote again to the company, and received in answer the following letter from *Samuel Shrubb*, the manager, dated the 14th of January, 1869: "Dear sir, the transfer of the fifty shares sold by you to Mr. *Strange* was left here for registration, but our transfer books are closed until after the 18th instant. The notices you see in the papers to wind up the company are inserted by a hungry pack of lawyers who wish to destroy the company in order that they may profit thereby. We must resist these attacks to the utmost of our ability, and with this view I should esteem it a great favour if you would forward me your proxy, which must be in the office to-morrow (Friday) to be of any value."

On the 6th of January the directors had ordered the transfer books to be closed.

It appeared that the usual weekly board meeting was held on the 8th of January, when both the transfers might have been registered. On the 16th of January Mr. *Lowe* received a letter from Mr. *S. Shrubb* to this effect: "Dear sir, in reply to your inquiry regarding the transfer of your shares, I beg to say that this transfer was duly submitted to my board on the 8th instant; but acting under the advice of the solicitor, the directors deferred the consideration of approving the transfer."

On the same day Mr. *Lowe* called at the office of the company, and saw the secretary, who informed him that he thought the company ought to have registered the transfer, but that the solicitor had advised the directors not to register any transfer, because it was at that time in contemplation to wind up voluntarily under the supervision of the Court.

On the 18th of January a meeting of the company was held, at which it was resolved that the company should be wound up voluntarily, under the supervision of the Court. This resolution was confirmed on the 3rd of February, and an order to that effect

was made by this Court on the 23rd of February, 1869. The liquidators appointed by that order had settled Mr. *Lowe's* name on the list of contributories as the owner of the whole of the seventy shares, including the fifty sold and transferred by him to Mr. *Strange*.

Upon the hearing of this summons before the Chief Clerk, he decided that he could make no order, his decision depending upon a consideration of the 8th article of association, which provided that no shareholder should be at liberty to transfer his shares without the previous consent of the directors obtained for the purpose; and also upon the reasonable conduct of the directors in deferring the registration of Mr. *Lowe's* transfer.

Mr. *Chitty*, for *Lowe*:—

The directors of this company were not justified in refusing the registration of the transfer from Mr. *Lowe* to Mr. *Strange*. The transfer was left at their office prior to the weekly board meeting of the 8th of January, at which time no resolution had been passed to wind up. It was not till the 3rd of February that the winding-up commenced: *Hodgkinson* v. *Kelly* (1), *Weston's Case* (2), *Dawe's Case* (3). It was held also in *Weston's Case* that the directors of a company have no discretionary power, independently of powers given them by the articles of association to refuse the registration of a transfer which has been *bonâ fide* made. The directors must have some valid reason for refusing to register; in this case no ground was ever stated beyond an intention to wind up, and even that was denied by the manager in his letter to Mr. *Lowe*. Mr. *Strange* was at the time a holder of other shares in the company, and there is nothing to shew that he was not quite as responsible a man as Mr. *Lowe*. If there had been any objection to Mr. *Strange*, it should have been stated at once, and there should have been no delay: *Nation's Case* (4).

[He also referred to *Robinson* v. *Chartered Bank* (5), *Evans* v. *Wood* (6), *Sichell's Case* (7), *Fyfe's Case* (8), and *Hill's Case* (9),

(1) Law Rep. 6 Eq. 496.
(2) Ibid. 4 Ch. 20.
(3) Ibid. 6 Eq. 232.
(4) Ibid. 3 Eq. 77.
(5) Law Rep. 1 Eq. 32.
(6) Ibid. 5 Eq. 9.
(7) Ibid. 3 Ch. 119.
(8) Ibid. 4 Ch. 768.
(9) Law Rep. 4 Ch. 769, n.

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to shew that the directors were bound to exercise their powers of refusing to register in a reasonable manner and without unnecessary delay, and that they had brought themselves within the 35th section of the *Companies Act*, 1862.

Mr. *Cotton*, Q.C., and Mr. *Edmund S. Ford*, for the official liquidator:—

When Mr. *Lowe's* transfer was left for registration, there were three petitions pending for winding up, all of which were presented before the 6th of January, therefore the directors were fully justified in declining to register the transfer on the 8th, when the weekly meeting of the directors took place. This case comes within *Shepherd's Case* (1), where it was held that there had been no unnecessary delay in registering a transfer which was presented the day before the weekly board meeting. There must be a reasonable time allowed for ascertaining the responsibility of the transferee. There was to be a meeting on the 18th of January, at which it was to be determined whether the company should be wound up, and the solicitor of the company very wisely advised the directors not to register any more transfers until the meeting. It cannot be said that there was no question about the propriety of admitting Mr. *Strange* instead of Mr. *Lowe;* there is no doubt from the evidence before the Chief Clerk, that that question was raised. It is evident that Mr. *Lowe* was considered the more desirable shareholder of the two, and the directors were justified, under the circumstances, in delaying the registration.

Mr. *Bagshawe*, for Mr. *Strange*:—

After these shares had been sold to Mr. *Strange*, they were retransferred by him to Mr. *Colbeck*, and if any one but *Lowe* should be on the register, it is *Colbeck;* what is law for one is law for the other; at any rate, Mr. *Strange's* name should not be upon the list of contributories. This necessarily follows from Mr. *Chitty's* argument. These proceedings are to rectify the register, and not to decide a question of priority between two persons, neither of whom is owner of the shares. There was quite as much unnecessary delay on the part of the directors in not registering

(1) Law Rep. 2 Ch. 16.

Colbeck, as in not registering *Strange*. It was not done on the first occasion, when in the ordinary course of business it ought to have been done. If there is no sufficient reason for the directors to delay the confirmation of the transfer, there is no reason for not doing it at once. This was the effect of the Master of the Rolls' judgment in *Nation's Case* (1), and the transferor and transferee must be considered as having had the transfer completed on the first meeting after the transfer is left for registration. I contend, however, that while the question of winding-up is *sub judice*, the directors act with great discretion in closing the transfer books, but under any circumstances the register cannot be rectified by placing upon it the intermediate man.

SIR R. MALINS, V.C.:—

This is a summons to alter the register of the *Hercules Insurance Company* by taking off the register the name of Mr. *Lowe*, and substituting for fifty shares the name of Mr. *Strange*. There is scarcely a fact in dispute in the case. The facts are that Mr. *Lowe* put his shares up for sale by public auction on the 8th of December, on which day Mr. *Strange* became the purchaser. The transfer was duly executed by Mr. *Lowe*, and lodged in the office for registration on the 5th of January following. In the regular course of business, the directors being bound to meet once a week, the next weekly meeting took place three days afterwards, namely, on the 8th of January. Now, by the 8th article of the articles of association, the directors have a discretionary power of refusing to accept a transferee. But it has scarcely been disputed that that is a power to be exercised in a reasonable manner, and if they have an objection to a transferee, whose transfer is tendered in the ordinary course of business, they should at once take the objection. It is admitted in this case that no objection to Mr. *Strange* was ever made. It never occurred to anybody that Mr. *Strange* was not as good a man as Mr. *Lowe* for the purposes of the company, until it was suggested by the official liquidator. It was not on the ground of any objection to Mr. *Strange* that the transfer was not made. In the ordinary course of business, the

(1) Law Rep. 3 Eq. 77.

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transfer ought to have been made on the 8th of January. There could be no possible excuse for delaying it beyond that day week, but I shall take the 8th as the day on which it became their duty, having raised no objection to the transferee, to perfect the title of the transferee, and relieve the transferor from all future liability. If the winding-up of this company had commenced before the 5th of January, that would have been a very good reason why they should not have made the transfer. It has also been admitted, and authorities cited to shew, that this being a voluntary winding-up under supervision, the commencement of the winding-up must be considered to have taken place on the day on which the resolution to wind up was confirmed, and that is the 3rd of February, a month after the transfer was tendered for registration. There was one Petition presented on the 5th of January, one on the 6th of January, and one had been presented on the 31st of December. If the presentation of these Petitions was a ground for the company refusing to register, what excuse can there be for instructing their secretary, by a letter, which I must presume was written by the authority of the directors, for it comes from their office, and I cannot doubt it is entered regularly in their letter-book, to write to Mr. *Lowe*, not giving the pendency of those Petitions as a reason for not registering, but stating, on the contrary, that the attacks upon the company must be resisted, and asking Mr. *Lowe* to forward his proxy for the meeting.

I was rather struck with the passage which would seem to treat Mr. *Lowe* as the owner of these shares, but that is sufficiently explained by the fact that Mr. *Lowe* was the undoubted owner of other shares, upon which he had paid up in full. After this the transfer is not completed. The next letter written from the office by Mr. *Shrubb*, is on the 16th, in which he says that this transfer was duly submitted to the board on the 8th instant, but acting under the advice of the solicitor the directors deferred the consideration of approving the transfer. Now, the question is, whose name ought to be on the register. I was surprised to hear the argument as between Mr. *Lowe* and Mr. *Strange*, because Mr. *Strange* upon every principle is bound to indemnify Mr. *Lowe*. He bought the shares on the 8th of December, before any petition even was presented, and as far as I know thought of, he, therefore,

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in some shape or other, must take upon himself the liability of the shares. Mr. *Strange* has admitted himself to be a shareholder by the document in which he actually executed the transfer of these identical shares to another person named *Colbeck*, and yet it is argued that instead of putting the name of *Strange* on, I ought to put on the name of *Colbeck*. The answer to that is, Mr. *Lowe* has nothing whatever to do with *Colbeck*, he sold his shares to *Strange*, and to *Strange* he executed a transfer. It was in my opinion the duty of the directors immediately to act upon that transfer, they having no reason to give against it, and if they thought the pendency of the Petition a ground for not allowing any transfer, they ought to have done as was done in *Shipman's Case* (1) where the transfers being tendered up to the 1st of March, the directors passed a resolution that in the state they were in they would allow no more transfers. If this company, finding that there were three Petitions against them on the 6th of January, had, on the meeting of the 8th of March, passed a resolution that they should make no more transfers, and had communicated that to the shareholders, there would have been something like fairness in the transaction; but instead of doing so the secretary wrote that braggadocio letter that the three Petitions were the work of a pack of hungry lawyers, who wanted to make a profit of them. That was a want of good faith, which disentitles them to any consideration except so far as they represent the shareholders. My opinion is that there is no case made by the company. This case falls apparently within the principle of the authorities cited by Mr. *Chitty*. *Sichell's Case* (2) has no application, because that was an act of the company to get rid of shares which they ought themselves to have admitted at an earlier period, but without going into any of the authorities, in my opinion *Nation's Case* (3), *Fyfe's Case* (4), and *Hill's Case* (5), are completely conclusive upon the subject. It having been the duty of the directors, on the 8th of January, to register the transfer of these shares, there was in my opinion within the meaning of the 35th section of the *Companies Act*, 1862, unnecessary and improper delay, which gives me complete power to direct the register to be

(1) Law Rep. 5 Eq. 219.
(2) Ibid. 3 Ch. 119.
(3) Law Rep. 3 Eq. 77.
(4) Ibid. 4 Ch. 768.
(5) Law Rep. 4 Ch. 769, n.

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rectified, as I do, by substituting the name of Mr. *Strange* for that of Mr. *Lowe*.

Suppose I refused this application, what would be the consequence? If Mr. *Strange* is a solvent man, Mr. *Lowe*, of course, would never submit to the loss. Upon every principle Mr. *Strange* is bound to indemnify him. The view I took in *Musgrave* and *Hart's Case* (1) was, because the authority of the Court of Appeal obliged me to do so—not from my own judgment, as may be seen by the report. I declined to put the name of Mr. *Hart* on the list because it was a subject for a bill, and not for a summary application under this statute. I regretted then, and I regret now, that the Court of Appeal restrained me from doing what I would have done in furtherance of justice, in altering the register. What was the consequence? A bill was filed in Vice-Chancellor *James's* Court, and the litigation lasted two years; and I am informed the result has been that Mr. *Hart* has paid the whole of the money, and in addition, the costs of the suit. What mercy was that to the parties? This case, in my opinion, is a case strictly and literally within my power. I am glad to be relieved from the difficulty which existed in *Musgrave* and *Hart's Case*, for here I have not a shadow of doubt what I ought to do, which is, to substitute the name of Mr. *Strange* for that of Mr. *Lowe*, and the order will be in the terms of the summons.

The costs of this resistance by Mr. *Strange*, which I consider wholly unjustifiable, must be paid by him, but in the event of his not being able to pay them, then Mr. *Lowe* will have from the liquidator such costs as he cannot recover from *Strange*. The liquidator will have his costs out of the estate.

Solicitors for Mr. *Lowe:* Mr. *A. S. Edmunds.*
Solicitors for the Official Liquidator: Messrs. *Merriman & Co.*
Solicitors for Mr. *Strange:* Messrs. *Williamson, Hill, & Co.*

(1) Law Rep. 5 Eq. 193.

In re VICTORIA PERMANENT BENEFIT BUILDING INVESTMENT AND FREEHOLD LAND SOCIETY.

V.-C. M. 1870 March 5, 7.

EMPSON'S CASE.

Building Society—Winding up—Contributory—Deed—Estoppel—False Recital.

E., the surveyor of a benefit building society, at the request of the directors agreed to purchase land of the society on the understanding that he could immediately mortgage it to the trustees of the society for the full amount of the purchase-money. The land was conveyed to *E.*, and he executed, without reading it or knowing its contents, a deed prepared by the solicitor of the society mortgaging the land to the trustees, which he believed to be an ordinary mortgage for securing the purchase-money and interest. The deed in fact recited that *E.* was a member of the society, and had subscribed for a certain number of shares, and that the purchase-money had been advanced to him in respect of his shares, and it contained a covenant by *E.* to make payments on the shares according to the rules of the society. *E.* never applied for shares, and did not comply with any of the conditions prescribed by the rules for the admission of members, his name was not entered in the register of members, and the directors never called upon him to make any payments as a member. Two years after the date of the mortgage the society was ordered to be wound up:—

Held, that the mortgage deed did not represent the real transaction, and that *E.* could not be made a contributory.

THIS was an application by *Frederick Empson* to have his name removed from the list of contributories of the *Victoria Permanent Benefit Building Investment and Freehold Land Society of Birmingham and the Midland Counties*, now being wound up by the Court.

The society was established in 1848 under the *Benefit Building Societies Act* (6 & 7 Will 4, c. 32), and its rules were duly certified by the barrister appointed to certify the rules of savings banks.

The 19th rule, under the heading "Admission and qualification of members," contained the following provisions: "Any person desirous of becoming a member of the society must make application on any Monday or Saturday evening between six and nine o'clock to the secretary, who will enter his name subject to the sanction of a meeting of the board of directors, and if a majority of the board present at any meeting approve, he shall be retained a member on signing the declaration book to observe and keep the laws; all persons who have been duly admitted and entered in the

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register, have signed the declaration book, have taken up one or more shares, and have made one or more payments to the society of any amount, shall be considered members." . . .

"At the time of admission every person must purchase a copy of the laws, a subscription book, pay the admission fee, and at least one night's subscription money." . . .

The rules also provided that members might subscribe for shares of £120, £90, £60, or £30, by weekly, monthly, quarterly, or half-yearly payments in advance, calculated to realise the full amount in thirteen years and two months, that they might increase their periodical subscriptions or pay the value of the share in advance, that fines should be imposed for default in payment of subscriptions, that members having made at least three months' payments, and not being in arrears, might on application have advances on their shares, according to the tables of the society, upon the security of land, and that the advanced members should enter into the usual legal covenants for the payment of all subscriptions, fines, or other payments, which should become due in accordance with the rules.

The preface to the rules, which was not certified, stated that the society would comprise a freehold land branch, and that the directors intended to purchase land for the purpose of enabling members to obtain a plot of freehold land at the wholesale price of sufficient extent to entitle the possessor to obtain a county vote, and that when an estate had been properly divided into allotments a ballot would take place for the several portions.

The rules alluded to "members in the land branch," but contained no provisions relating to the sale of land by the society.

In June, 1866, *Empson*, who was the surveyor of the society, but not a member, was asked by the directors to concur in a ballot for the allotment of land belonging to the society, which he agreed to do upon the understanding that he could immediately mortgage the land to be purchased by him for the full amount of the purchase-money.

Accordingly, by two deeds, dated the 6th of August, 1866, two pieces of land were conveyed to *Empson* by the trustees of the society in consideration of £77 18*s.* 6*d.* and £153 respectively, and by two mortgage deeds, dated the 8th of November, 1866,

the same lands were mortgaged by *Empson* to the trustees of the society. The mortgage deeds contained recitals that *Empson* was a member of the society, and had subscribed for, in one case, four, in the other case, seven shares, and was entitled by the rules of the society to receive out of the funds thereof, in the one case £77 18*s.* 6*d.*, in the other case £153, on account of his said shares, and that the purchase-money for the land purchased by *Empson* were advanced by the trustees out of the funds of the society on account of his said shares. The deeds also contained covenants by *Empson* to make the several payments which, under the rules of the society, should become due "in respect of the said shares and the said advance," and to observe and keep the rules for the time being of the society in respect of the same shares and advance, and of the mortgaged premises, and any buildings to be erected thereon, and provided for the redemption of the mortgaged property by payment of the subscriptions, &c., in respect of the shares.

Empson never applied for any shares, or in any way complied with the rules for the admission of members; his name was not entered on the register of members, and he never paid nor was asked to pay any subscriptions or fines.

On the 1st of July, 1868, the society, being unable to pay its debts, was ordered to be wound up under the *Companies Act*, 1862.

Empson having been placed on the list of contributories in respect of eleven shares, now applied to have his name removed from the list.

In an affidavit in support of the application he stated that nothing was ever said to him as to his taking shares, that he executed the mortgage deeds without having read them, having no suspicion that they contained any reference to his being or intending to be a shareholder, and on the faith that he should incur no other responsibility than payment of the purchase-money for the land and interest in respect thereof, and that before signing the deeds he inquired if he might do so in full faith as to their being correct, and received an assurance in the affirmative.

According to the rules of the society, a subscription for four shares of £120 each would have entitled *Empson* to an advance of

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£230 18*s.* 6*d.*, but it was stated by the official liquidator that all the sales made in June, 1866, were made on the condition that the purchase-money, if advanced by the society, should be repaid in five years instead of thirteen years and two months, and therefore all the purchasers were made members for a larger number of shares than they would have subscribed for if the money had been repayable in thirteen years and two months.

Mr. *E. C. Willis*, for the applicant:—

The applicant never became a member of the society. He never applied to become a member or complied with any of the provisions of the rules relating to the admission of members. He had not, as in *Levita's Case* (1), been entered on the register, or in any way acted as a shareholder. The sole ground upon which it is sought to make him a contributory is his execution of the mortgage deeds, which contain recitals that he had subscribed for shares, and had received advances on account of them, and covenants by him to make payments in respect of the shares and advances. But these recitals are entirely fictitious, and the covenants to make payments in respect of shares which did not exist are a nullity. The applicant is not estopped by the recitals, for the trustees of the society, who were the only other parties to the deeds, and whose solicitor prepared them, could not be deceived by recitals which they must have known to be fictitious. There was no contract between the applicant and the society or its directors that he should take shares; he could not have compelled the directors to admit him, nor could they have compelled him to be admitted as a member. They have never treated him as a member nor called upon him to make any payments in respect of any shares. The transaction between the applicant and the trustees had nothing to do with the rules of the society; at their request he agreed to buy some of their land, on the understanding that the purchase-money should remain on mortgage of the land. The only right of the society against him is to have the mortgage paid off or to have the land sold, and if the sale does not produce the amount of the mortgage debt, to have the deficiency (if any) made good by him. According to the rules he might have obtained an advance of

(1) Law Rep. 3 Ch. 36.

£230 18*s.* 6*d.* upon four shares only; if therefore he is to be made a contributory at all, it can only be in respect of four shares.

Mr. *Glasse*, Q.C., and Mr. *Bedwell*, for the official liquidator:—

Empson, as the surveyor of the society, must be taken to have known that he could only purchase land from the trustees and obtain an advance of the purchase-money by becoming a member, and that he must execute a mortgage deed binding him to repay the advance by payments on shares according to the rules. He has executed such a deed, and he cannot be heard to say that he did not know its contents. If he wishes to repudiate the deed he must file a bill to set it aside. Having had the benefit of membership by obtaining the land, which might have turned out very profitable, he cannot escape from being a contributory simply because he has not complied with the rules as to admission of members, and has not made payments on his shares. In building societies there is no necessity to enter the name of a member on a register; even in the case of joint stock companies, where registration is compulsory, the register is not conclusive.

Mr. *Willis*, in reply.

SIR R. MALINS, V.C.:—

The case of Mr. *Empson* is this: he had been for some years surveyor of the society; he knew the rules of the society; but it is admitted (or rather the contrary is not attempted to be proved) that he had never taken a share and never taken part as a shareholder in the affairs of the society. He had never in any way stood with regard to the society in any other position, as I understand it, than that of surveyor.

Now I will refer to the early part of the 19th rule for the purpose of shewing who are the members of the society. It is headed "Admission and qualification of members." [His Honour read the rule, and continued:—] Mr. *Empson* never was admitted a member; he never asked for a share, and no share was offered to him. The 26th rule provides that "every person on admission into this society shall pay an entrance fee on each share." That he never did. His name is not to be found in the

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list of shareholders or rather members of the society, and I understand it to be admitted that on no one occasion has he ever paid a penny to the society, nor has he received directly or indirectly a penny from the society, except his fees as surveyor. He never has received a penny from the society as a member or shareholder, or as an advanced member. But it is sought now to put him on the list of contributories for eleven shares, and the application is made on the ground that in the year 1866 he signed two deeds, by which he acknowledged himself to be a member in one of them for seven shares and in the other for four shares. Certainly nothing can be more express than the manner in which he has acknowledged himself to be a shareholder. The deeds are dated the 8th of November, 1866; one of them contains this recital: "And whereas the said *Frederick Empson* is a member of the said benefit building society, and has subscribed for four shares of the value of £120 each therein; and by the duly enrolled rules of the said society he is entitled to receive out of the funds thereof the sum of £77 18*s.* 6*d.* on account of his said shares therein. And whereas the said sum of £77 18*s.* 6*d.* in the said recited indenture mentioned to have been paid by the said *Frederick Empson* for the purchase of the hereditaments and premises therein and hereinbefore mentioned and described, was in truth and in fact advanced and paid by the said trustees out of the funds of the said society at the request and on account of the said *Frederick Empson* and of his said shares for the purpose of enabling him to make such purchase upon his agreeing to execute such mortgage security as is hereinafter contained." Then he is made to convey the property by way of mortgage, not for the £77 18*s.* 6*d.*, but, as is usual, to secure the subscriptions, fines, fees, and so forth, by payment of which he will be released from the debt. The other deed is to the same effect with respect to seven shares, *mutatis mutandis*. We may take it, in fact, as if this had been one deed for eleven instead of one for seven and another for four shares.

But Mr. *Empson* says, "That deed does not represent the transaction at all. I executed that deed without knowing what it contained; I never read it. I had confidence in those who prepared it. I was an officer of the society. I was asked to sign

that deed by the trustees. I never read it, and I did not know that it contained that recital." Now it is important to remark, that the person who would have read it to him, if anybody, was the solicitor of the society, and it is remarkable that the solicitor gives no evidence upon the subject. I am bound to come to the conclusion, and I do distinctly and satisfactorily to my own mind come to the conclusion, that when Mr. *Empson* signed these deeds he did not know that they contained that recital that he was a member of the society. Certain it is that the recital is altogether erroneous, because it is not that he will become a member of the society, but that he is so actually. Now it is positively certain that he was not on that day a member of the society; for though the society had been in existence since 1848, and this took place in 1866, he had never taken a share in the society; he had not done one act, nor had they ever recognised him as having done one act, constituting him a shareholder. The recital in that deed therefore is obviously incorrect, and I am quite satisfied that it does not represent the real transaction, and that Mr. *Empson* never did intend to become a member of the society. I am borne out in that by the fact that, though the society continued to exist for two years after the execution of these deeds, and if he was a member of the society it was their duty to call upon him to pay his monthly subscription, yet he never paid anything and he was never asked to pay anything. It is very true that if a man will have the folly to execute deeds which he has not looked at he must suffer the consequences. I am afraid we all do it when we have solicitors in whom we have confidence. I do not believe any one reads through all the deeds that are brought to him to sign if they are presented by a solicitor in whom he has confidence. This gentleman was an officer in this society; he was told that it would be very convenient to the society that he should become the purchaser of this land: he did become the purchaser of the land; there are two sets of deeds as to each purchase, by one of which the property is conveyed to him, and by the other of which he mortgages it to the trustees of the society. It therefore suited their arrangements, according to his evidence (and there is no contradiction of it), at that time that this should be done; he did it to oblige them, and the conclusion I come to is, that the deeds

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were erroneously drawn; that he ought not to have been asked to execute them; that, though he did execute them, they do not represent the real transaction, and that I am bound to look at what the real transaction is; and looking at it in that way, I come to the conclusion that it is impossible I can treat him as a contributory in respect to these shares, of which he has erroneously stated himself to be the holder.

But a very fair offer was made on his behalf—and it is an offer by which I think he must abide—that he would either submit to be a shareholder for four shares, which would cover the amount of the advance of £230 18*s.* 6*d.*, or he would purchase the land at that price. The land is said to be worth a smaller amount. I think, therefore, the proper course would be that he should be treated as the purchaser of the land for £230 18*s.* 6*d.* Either he must sell the land and pay the society, or they may sell the land, and call upon him to pay the difference. But he must pay the amount which is professed to be secured by those deeds. Therefore I think, looking at the whole transaction, the proper order will be that, upon Mr. *Empson* submitting to pay within six months £230 18*s.* 6*d.*, with interest at 5 per cent. from the date of the transaction, he must be taken off the list of contributories.

With regard to the costs, I cannot give Mr. *Empson* any. The official liquidator must have his costs out of the estate, and Mr. *Empson* must pay his own.

Solicitor for the Applicant: Mr. *R. Chandler.*

Solicitors for the Official Liquidator: Messrs. *Burton, Yeates, & Hart.*

In re VICTORIA PERMANENT BENEFIT BUILDING, INVESTMENT, AND FREEHOLD LAND SOCIETY.

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Building Society—Power to Borrow—Illegal Rule of Building Society—Loan to Building Society on Deposit.

A rule of a benefit building society authorizing the borrowing of money by the society to an unlimited amount is illegal under the *Building Societies Act* (6 & 7 Will. 4, c. 32).

The rules of a benefit building society contained no express power of borrowing money, but provided that "persons merely joining the society to invest or deposit money" should not be entitled to vote at meetings of the society, nor be called upon to serve any office, and that "investors not in the building branch" might withdraw their deposits on giving a month's notice, if no other time was agreed upon when the deposits were made, and should be entitled to interest on all moneys which should have been in the hands of the society more than one month. The rules also provided that any member having received advances on his shares should be held as legally discharged from all connection with the society as soon as he had discharged all subscriptions and moneys due from him on account of his shares, according to the rules.

The directors received money on deposit from persons who did not subscribe for shares in the society, and gave to each depositor a book called a "Member's Deposit Book," which contained printed rules purporting to be "Rules of the Deposit Branch," one of which provided that the general rules of the society should be binding on all persons who might make deposits.

The society was wound up by the Court, and the advanced shareholders, under an order in the winding-up, redeemed their shares:—

Held, that the rules of the society, if and so far as they authorized borrowing money on deposit, were illegal, as no limit was fixed to the amount which might be borrowed; and that the depositors were not entitled to have a call made upon the members for the repayment of their deposits:

Held, also, that the rules did not authorize the borrowing of money from persons who were not members of the society, and that the depositors were bound by the rules of the society, by which the advanced shareholders who had redeemed their shares were discharged from all connection with the society; and, consequently, on that ground also were not entitled to have a call made on the advanced shareholders for the repayment of their deposits.

THE *Victoria Permanent Benefit Building, Investment, and Freehold Land Society of Birmingham and the Midland Counties*, was

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established in 1848, as a benefit building society, under the 6 & 7 Will. 4, c. 32.

The rules of the society, which were certified by the barrister appointed to certify the rules of savings banks, contained the following provisions:

(1.) . . . "The object [of the society] is to raise a fund of periodical subscriptions for the purpose of enabling its members to build houses, to make investments, to pay off mortgages, or to purchase properties or land."

(19.) . . . "All persons, whether males or females, or minors, who have been duly admitted and entered in the register, have signed the declaration-book, have taken up one or more shares, and have made one or more payments to the society of any amount, shall be considered members, and be liable to the duties and requirements set forth in the rules, except that persons merely joining the society to invest or deposit money shall not be entitled to vote at any general meetings of the society, nor be called upon to serve any office.

"At the time of admission every person must purchase a copy of the laws, a subscription-book, pay the admission fee, and at least one night's subscription money, and also state which branch of the society he proposes to join."

(20.) . . . "Investors not in the building branch may withdraw their deposits on giving one month's notice to the secretary, if no other time was agreed upon when the deposits were made, and they shall be entitled to interest on all moneys which have been in the hands of the society more than one month.

"If at any time more than one member shall give notice to withdraw his deposits or shares, the directors shall have power to consider and determine on the applications in the order they are made."

(29.) "Any member having received advances on his share or shares shall be held as legally discharged from all connection with this society as soon as he has, by his periodical or other payments, liquidated and discharged all subscriptions and moneys due from him on account of his said shares according to these rules, and on his depositing his subscription-book with the secretary.

(42.) "In the construction of these rules, and in all bye-laws

made by virtue thereof, the term 'member' shall extend either to one or to several persons holding a share or shares jointly or severally."

Until the year 1861 the rules contained a clause empowering the directors to borrow money, but this clause was struck out on the revision of the rules in 1861, in accordance with the opinion given by Lord *Westbury*, when Attorney-General, that such a power was contrary to the *Building Societies Act*.

The society received money on deposit from a great number of persons. Every depositor, on making his first deposit, received from the secretary a book in which the amounts of his deposits were entered, having the words "Member's Deposit Book" printed on the cover, and containing printed rules, called "Rules of the Deposit Branch," which were not certified by the barrister appointed to certify the rules of savings banks. The first of these rules provided that "the general rules of the society, so far as they are not superseded by the following, shall be binding on all persons who may make deposits."

The depositors paid no admission fees, and made no other payments to the society. They received interest on their deposits at 5 per cent. Some of them signed the declaration required by the rules of the society to be signed by members on admission, which was in these terms:

"I, by occupation a residing at having been admitted a member of the *Victoria Permanent Benefit Building, Investment, and Land Society*, do hereby agree that this declaration shall be the basis of the contract between the society and myself, and that I will faithfully observe all and several the laws and regulations of this society, a printed copy of which I acknowledge to have received on admission; and I do furthermore consent and agree that all payments made by me, and all contracts and engagements connected therewith, shall in all respects be subject to the laws and regulations as shall from time to time be made in conformity therewith; and the directors, on behalf of the society, do also hereby agree that on their part they will act towards me in conformity with the before-mentioned rules and regulations."

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On the 1st of July, 1868, the society was ordered to be wound up by the Court.

On the 16th of December, 1868, an order was made in the winding-up, giving liberty to the advanced shareholders to redeem their mortgages by paying all principal and interest, with fines and other charges, due from them to the society according to the rules of the society and the terms of their mortgages; but such payments and redemption to be without prejudice to the liability of any shareholder so redeeming as a contributory to the society in respect of the share or shares held by him.

Hill and *Jones* were advanced shareholders who had been placed on the list of contributories, but had redeemed their mortgages under the above order, and had received their mortgage deeds, with receipts indorsed by the official liquidator.

At the commencement of the winding-up upwards of £26,000 was due from the society on deposits. All the depositors had been admitted on the list of creditors, and a call of £10 per share had been made on the contributories principally for the purpose of paying the depositors.

Jones' Case came on upon a summons taken out by *Jones*, to have the names of three of the depositors (selected as representatives of the class) removed from the list of creditors.

In *Hill's Case*, *Hill* had objected to the call being made on him to pay the depositors, and the question was adjourned into Court.

Mr. *Cotton*, Q.C., Mr. *Higgins*, and Mr. *F. Kelly*, for *Jones* and *Hill*:—

The borrowing of money on deposit was illegal and *ultrà vires*. Assuming that the rules authorized the directors to borrow money to an unlimited amount, such a power was invalid, being contrary to the 6 & 7 Will. 4, c. 32. It would entirely defeat the object of the Act, if the directors of building societies were allowed to involve the members in liabilities to any amount by borrowing money which might be used for all kinds of speculative purposes. In *Laing* v. *Reed* (1), though it was held that a limited power of borrowing for the legitimate objects of the society was lawful, it was

(1) Law Rep. 5 Ch. 4.

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distinctly laid down that an unlimited power, which would virtually alter the nature and character of the society, would be illegal. A society which has obtained the advantages conferred by the *Building Societies Act* cannot, by its rules, change itself into a land society or a bank of deposit: *Grimes* v. *Harrison* (1); *In re Kent Benefit Building Society* (2).

But the rules of this society, since they were revised and certified in 1861, have contained no such power. The only rules from which any power of borrowing money can be implied are the 19th, which relates to the admission and qualification of members, and the 20th, which relates to the withdrawal of members. Both of those rules imply that the persons from whom deposits may be received must be members of the society, though not entitled to vote at general meetings or liable to be called upon to serve any office. The depositors, in fact, have been treated as members of the society; some of them have signed the declaration of membership, and all have received the book called a "Member's Deposit Book," which contains a statement that they are bound by the general rules of the society. They are, therefore, either members of the society and contributories, or, if not actual members, they have contracted to be bound by the rules of the society. But, by the 29th rule, the advanced members who have paid all subscriptions and moneys due on account of their shares are discharged from all connection with the society, and therefore are under no further liability to members of the society or to persons who have agreed to be bound by its rules: *In re Doncaster Permanent Building Society* (3); *Priestley* v. *Hopwood* (4). The depositors are in this dilemma; if they are not members or *quasi*-members the borrowing was *ultrà vires*, and they are not creditors of the society at all: *In re National Permanent Benefit Building Society* (5):—[The VICE-CHANCELLOR referred to *In re Cork and Youghal Railway Company* (6)]. In that case it was a question of distributing the assets of the company which had been acquired by means of the loan; here it is a question of making a call on the shareholders; and in the case of the *National Permanent Benefit*

(1) 26 Beav. 435. 5 Jur. N.S. 528
(2) 1 Dr. & Sm. 417. 7 Jur. N.S. 1045
(3) Law Rep. 3 Eq. 158.
(4) 12 W. R. 1031.
(5) Law Rep. 5 Ch. 309.
(6) Ibid. 4 Ch. 748.

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Building Society (1), Lord Justice *Giffard* held that the principle of *In re Cork and Youghal Railway Company* (2) did not apply to such a case as the present. If the depositors are members or *quasi*-members, they are bound by their contract to make no further claim upon *Jones* and *Hill* and the other advanced shareholders who have paid all their subscriptions.

Mr. *Hardy*, Q.C., and Mr. *Woodroffe*, for the depositors :—

The rules of this society distinctly provide for the receipt of money on deposit; it cannot therefore be contended that the directors in receiving deposits were acting *ultrà vires*, and that the depositors are not creditors of the society, as in *In re National Permanent Benefit Building Society*, where the rules contained no power of borrowing. The depositors, as such, are not members of the society. The Act 6 & 7 Will. 4, c. 32, s. 1, implies that the capital of building societies is to be divided into shares, and that every member must subscribe for a share or shares. The rules of this society imply that all members must be shareholders. The 42nd rule defines the term "member" as extending to "one or more persons holding a share or shares jointly or severally;" the 19th rule requires that all members shall be admitted with the sanction of the directors, and shall take up one or more share or shares; no doubt the subsequent part of that rule relating to depositors is obscurely worded, but the real meaning of it is that those who are connected with the society merely as depositors shall not be members. In the 20th rule, "investors not in the building branch" must mean "investors who are not members," and in the same clause provision is made for the case of depositors who are also members. Depositors who are not members may withdraw their deposits at any time on giving a month's notice; but in the case of depositors who are members, the directors may consider and determine on the applications to withdraw in the order in which they are made. In fact, the depositors have never been treated as members; they have never been admitted, or paid admission fees, or had anything to do with the society beyond depositing their money and receiving interest. The signature of the declaration could not make them members unless they sub-

(1) Law Rep. 5 Ch. 309. (2) Law Rep. 4 Ch. 748.

scribed for shares, and the so-called rules in the deposit-books are not binding either on the society or the depositors. If it should be held that the depositors are bound by rule 29, the result would be that the operations of the society would be carried on for the exclusive benefit of the members at the exclusive risk of the depositors. If the advanced members who have redeemed their mortgages are released by rule 29 from liability, it follows that, by the same rule, the unadvanced shareholders may claim in priority to the depositors the amount which they have subscribed, with interest, and will then also be free from liability. Even as between the members, that rule was only applicable so long as the society was a paying concern, but as against the depositors, who are not members, it cannot in any way limit the liability of the members advanced or unadvanced: *Greenwood's Case* (1); *In re Doncaster Permanent Building Society* (2).

The question remains whether the rules, so far as they authorize borrowing money on deposit, are altogether illegal, and, if so, whether the members of the society can repudiate the transaction. The Act 6 & 7 Will. 4, c. 32, only requires that the rules shall not be repugnant to the express provisions of the Act and to the general laws of the realm; but there is not in the Act itself any prohibition of borrowing, and it certainly is not contrary to the general law of partnership for persons forming themselves into a society to agree that the society may borrow money. In determining on the validity of the rules of a building society, the Court must confine itself to the express provisions of the Act and the general law of the land, and cannot speculate upon the intent and scope of the Act. The *dictum* of the Lord Chancellor in *Laing* v. *Reed* (3) was unnecessary for the decision of the case; the question of the necessity of a limit to the power of borrowing had not been argued. The power of borrowing there was virtually unlimited, for there was no limit to the number of advanced shareholders, and the directors might borrow to the extent of two-thirds of the amount for the time being advanced. If a limited power of borrowing is, and an unlimited power is not legal, how is the limit to be ascertained? Is the Court to decide in each particular

(1) 3 D. M. & G. 459, 475. (2) Law Rep. 3 Eq. 158.
(3) Law Rep. 5 Ch. 4.

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case whether the limit is reasonable? Surely the members of the society must be the judges of the reasonableness of the limit; and, if so, why should not they give themselves an unlimited power? If the Legislature had intended to prohibit or restrict the power of borrowing, the Act would have so provided, as in the case of railway companies. Such a power is commonly inserted in the rules of benefit building societies, and is generally considered beneficial to societies by enabling them to borrow money at a lower rate and advance the money at a higher rate to their members: *Scratchley* on Building Societies (1); *Barry* on Building Societies (2). The receipt of money on deposit is no more inconsistent with the objects of a building society than the purchase of land, which has been held to be lawful if authorized by the rules: *Mullock* v. *Jenkins* (3); *In re Kent Benefit Building Society* (4). At all events, by the 10 Geo. 4, c. 56, s. 4, which is incorporated with 6 & 7 Will. 4, c. 32, the members of the society are bound by the rules and cannot repudiate them: *Grimes* v. *Harrison* (5); *Hughes* v. *Layton* (6). [They also referred to *Armitage* v. *Walker* (7).]

Mr. *Glasse*, Q.C., and Mr. *Bedwell*, for the official liquidator:—

In *Laing* v. *Reed* (8) the whole argument turned upon the illegality of any power of borrowing, and the question of the power being limited or unlimited was not touched upon. The power to receive money on deposit is a very different thing from a power to go into the market and borrow money. It will be a great hardship upon these depositors, who, upon the faith of rules made by the members of the society, and certified by Mr. *Tidd Pratt*, have lent their money to the society, if the members are allowed to repudiate their liability to repay the loan.

Mr. *Cotton*, in reply:—

If there is any doubt upon the construction of rules 19 and 20, the Court will favour that construction which would authorize the receipt of deposits from members only, and will not, upon the

(1) Page 9.
(2) Page 52.
(3) 14 Beav. 628.
(4) 1 Dr. & Sm. 417.
(5) 26 Beav. 435.
(6) 10 Jur. (N.S.) 513; S. C. *sub. nom. Reg.* v. *D'Eyncourt*, 4 B. & S. 820.
(7) 2 K. & J. 211.
(8) Law Rep. 5 Ch. 4.

strength of an obscure clause, hold the members liable for unlimited loans. An unlimited power of borrowing would have converted this building society either into a banking company, which would have been illegal, as it was not registered under the *Joint Stock Banks Act* (7 & 8 Vict. c. 113), or into a partnership for purposes of profit, which would be illegal, as it was not registered under any of the *Joint Stock Companies Acts*.

SIR R. MALINS, V.C. :—

The question raised by these two summonses is, whether a benefit building society, established under the 6 & 7 Will. 4, c. 32, has a general power of borrowing money. It is argued, on the part of the creditors, that these societies have a general unlimited power of borrowing; on the other side that is denied, and it is said, moreover, that if they have a power of borrowing, the power must be exercised in this way: that when the money is deposited, it is deposited with notice of the constitution of the society, and that it virtually comes to a loan of money to a society with limited liability, not actually so, but virtually so. Now, that is a matter of very great importance to a very large class, and a class which deserves the highest consideration—the working or industrious class—and if it is decided that this society, and others in the same situation, have no power of borrowing, great numbers of persons of limited means who have been led into lending to this society in particular, and to other societies in the same situation will, I am afraid, necessarily lose all they have lent. On the other hand, if it should be held that these societies have an unlimited power of borrowing money, then, of course, the members of the society who, according to the argument of Mr. *Hardy*, are bound by such borrowing, instead of being committed merely to making a monthly payment for twelve, thirteen, or fourteen years, as it may be, according to the constitution of the society, may, in consequence of this unlimited power of borrowing having been exercised by the directors, find themselves liable to pay every farthing that they possess in the world, for I do not see that the argument stops short of their being called upon to pay £1000, or even £10,000, if the managers of the society think fit so to deal with the funds as to render that necessary.

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Now, is a general unlimited power of borrowing money within the purview and object of these societies? That these societies cannot borrow money unless there is an express power to do so by their rules is thoroughly settled. That was recently decided by Lord Justice *Giffard* in the case of the *National Permanent Benefit Building Society* (1), and that case affords a remarkably strong instance of the strength of the rule that any loans made to these societies, where there is no power of borrowing, are absolutely void, and cannot be enforced against the society, or through the society against any of the members of it. In that case there was no power to borrow in the constitution of the society—the rules were entirely silent on that subject; an order had been obtained from the Master of the Rolls, without argument, to wind up the society in respect of a debt of £1300 lent by another society to the building society. A question afterwards arose as to the liability, and Lord Justice *Giffard* invited the parties to bring the question of the legality of this loan before him on an application to discharge the order to wind up. That was argued in November last; he gave his judgment on the 17th of December, and absolutely discharged the order to wind up the company on the ground that the society had no power to borrow. [His Honour read a part of the judgment of Lord Justice *Giffard*, and continued:—] The same principle will be found in a judgment of Vice-Chancellor *James* in *Moye* v. *Sparrow* (2), where he says: "In this case a great number of questions have been mooted, which I will endeavour to treat *seriatim*. The first which arises is, What power had this society"—it was a building society—"to borrow? Now, the only power of borrowing which this society had is that conferred by clause 13. Now, I am of opinion that, under that section, no loan could be properly made by the managing body so as to bind the society unless to make an advance to a member, who agreed to the terms specified. This is a building society, and though it has been held in the case of *Laing* v. *Reed* (3) that such a society may have a power of borrowing, it must not be supposed that every such society has by law an unlimited power to borrow." Therefore I take it to be perfectly clear that if, in the present case,

(1) Law Rep. 5 Ch. 309. (2) 18 W. R. 400, 402.
(3) Law Rep. 5 Ch. 4.

there had been no power of borrowing, not one of these advances on deposit would have constituted a debt of the company. They clearly would not have supported a petition to wind up, and they clearly could not have been admitted as debts against the company or its contributories.

I confess, individually, I adhere very much to the opinion I expressed in *Laing* v. *Reed* (1), which was that the object of this Act of Parliament was to enable these societies to raise money by subscriptions, and subscriptions only, that is, monthly or weekly subscriptions; and it never was in the contemplation of the Legislature to enable them to raise money by borrowing at all. But, before I come to that case, let me look for one moment at the principle of these cases. If the argument that this unlimited power of borrowing exists, where there is any power whatever given, were to prevail, what would be the consequence? Why, that these poor persons in a humble situation of life, having joined this society for the purpose of, by means of these monthly subscriptions, raising money to provide themselves with residences, may find, as they do find in this case, that the governing body have borrowed money to an enormous amount. It might just as well have been £1,000,000, or any other amount, for the purpose of the argument; for it is said that there is an unlimited power on the part of the directors to receive deposits, not merely from members of the society, but from the outside world, to any amount; and nobody will pretend that the depositors are under any obligation to see to the application of the money. What, then, is the consequence of this? If they have an unlimited power of receiving deposits, they have an unlimited power of disposing of them. Mr. *Hardy* said that it was a great benefit to a society of this kind that they should be able to borrow at a low rate of interest and re-invest at a high rate; in other words, that they should become a discount society. I put the case during the argument, "Do you contend that, in the first quarter of the year 1868, this society might have borrowed £100,000 on deposits, the lenders being in no way bound to see what the society did with it? Supposing they had no land or houses, and you found that they lent it upon mortgage, or upon bills of exchange, or applied it to any of the purposes by which they could make

(1) 39 L. J. (Ch.) 3.

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profit, can it for one moment be argued that that would be within the purview and objects of societies of this kind?" I am most distinctly of opinion that it is not, and that, if I were to come to the conclusion that it is, I should be acting in violation of the express words, and, as I read it, of the object of the Act of Parliament. It is a grievous hardship, no doubt, that persons in a humble situation of life should have been led into making advances, as they undoubtedly did, in the belief that they were lending upon proper security, and that they had the liability of the company to repay them; but, as I have already pointed out, it would be an equal grievance to those poor persons who have joined this society in the belief that their liability is limited to these monthly subscriptions for twelve or fourteen years at the utmost, to find that everything they possess is at once swept away, because the governing body has thought fit to exercise this unlimited power of borrowing. In my opinion that argument cannot be sustained for a moment, and it is only on the ground of the power being limited that I think it is possible that any power of borrowing can be sustained.

Now, if it had not been for the decision of the Court of Appeal in *Laing* v. *Reed* (1), I should have come to the conclusion that there was no power of borrowing whatever. That, I understand, was the opinion of Lord *Westbury* when Attorney-General. Of course that is not a judicial opinion, but it is an opinion entitled to weight, and it had some weight with me when I gave my judgment on the demurrer in *Laing* v. *Reed*. Other persons, whose opinions are entitled to great weight, have come to the same conclusion; and upon my own judgment I should, now that I am called upon to decide this case, if it had not been for the decision of the Court of Appeal in *Laing* v. *Reed*, have come to the conclusion that borrowing money was altogether beside the object of these societies, and illegal. I am bound, however, by the decision in *Laing* v. *Reed*, but only by what that case has actually decided. Now what did it decide? There the society was a society of precisely the same nature as this, a building society. The 18th rule was in these terms: "That the trustees for the time being may from time to time, as occasion shall require, borrow and take up at interest any sum of money from any banker with whom the

(1) Law Rep. 5 Ch. 4.

funds of this society shall be deposited, or from any other person, to procure which the trustees may give their own personal security, and they shall be indemnified out of the first funds of this society which shall be received." Now, if the rule had stopped there, as a mere general power of borrowing, it is perfectly clear from the decision of the Court of Appeal that it would have been held invalid, and money borrowed under it would not have constituted a debt against the society, but it was saved by this qualification: "The total sum of money to be borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society, including the mortgage or mortgages for which such advance may be required." Instead of being a general and unlimited power, it was a limited power, and the Lord Chancellor expressly decides the case upon that footing. I am fully aware that it is said by the counsel who argued the case, that it was not put upon that footing before the Court of Appeal, and that it did not occur to the counsel on either side that the case depended on that, and I am certain it was not so argued before me; but the Lord Chancellor, in giving his judgment, uses these words: "If the rule had authorized the trustees to raise an unlimited sum of money wholly regardless of the contributions which might be made by its members, that, no doubt, would be contrary to the intent and scope of the Act." Mr. *Hardy* has been very anxious that I should regard that as an *obiter dictum* of the Lord Chancellor having no reference to the subject matter in hand, and that I, sitting as Vice-Chancellor, should exercise my own judgment on the subject, and give the go-by to what the Lord Chancellor has said. On the contrary, I regard it as the very sum and substance of his decision; for His Lordship did not intend that in these societies an unlimited power of borrowing should be given to the governing body, because I think his Lordship saw—probably much more distinctly than I can see—the enormous evils which might arise from such a construction of these powers. Therefore his decision is, that it is only where there is a limited power that it is valid, and where the power is unlimited it is clearly invalid. Lord Justice *Giffard*, in his judgment, puts precisely the same thing in different words. He says: "I take it that the rule would be repugnant to the ex-

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press provisions of the Act if it had been a rule which had made the society a thing different from that which is specified in the Act and meant by the Act; if, for instance, it had made the society an insurance society, or a discount society, or a bank, then I think it would be repugnant to the Act, and the certificate would not be conclusive." Now, I am of opinion that the extent to which the argument is carried here would make this society a thing totally different from what was contemplated by the Act; it would not make it an insurance society, but it might very well make it, and probably would make it, a discount society or a bank, for a place in which persons may deposit money to any extent whatever, and get their interest upon it, and draw it out when they think fit, is in fact a bank. This, therefore, would be, in the words of the Lord Justice, turning it into a thing totally different from what was contemplated by the Act.

Now, the case I have referred to of the *National Permanent Benefit Building Society* (1) shews distinctly that the judgment of the Lord Justice in *Laing* v. *Reed* (2) was founded upon its being a limited power, because he there says: "Until the recent decision of the Court in *Laing* v. *Reed*, it was doubted whether, even if you put a limited borrowing power [as it was in the particular case], among the rules of a society of this sort, that particular rule would be legal;" shewing, therefore, that he considered the decision of himself and the Lord Chancellor as proceeding entirely upon its being not an unlimited but a limited power of borrowing.

I find it, therefore, expressly decided that where there is no power of borrowing no loan can be contracted, and that where there is a limited power a loan may be contracted. I am of opinion that if there be a power in this case, it is a wholly unlimited power, and therefore wholly void; and the evils which I pointed out would necessarily follow from the exercise of such a power, namely, that this, instead of being a building society, would, in fact, become a discount society, or a bank, or anything to which the directors choose to turn it, as Mr. *Hardy* has put it, borrowing at a low rate of interest and lending at a high rate. That, in my opinion, is repugnant to the whole object of the Act of Parliament, and I must hold that such a power is absolutely void. If, therefore, the

(1) Law Rep. 5 Ch. 309, 312. (2) Law Rep. 5 Ch. 4.

case rested on the general point of an unlimited power of borrowing being inserted in these rules, I should come to the conclusion that such a power is absolutely void.

The conclusion which I have come to on this first point relieves this case of any further difficulty, but I think I am not at liberty to pass over the other points which have been strongly urged. One of them is this, that in this case an unlimited power of borrowing was never contemplated; and I agree with Mr. *Cotton's* construction, because I am informed, as a matter of fact, that until the year 1861 this company did, by its rules, possess an unlimited power of borrowing, but that in 1861, upon consideration, and, I believe, upon Lord *Westbury's* opinion, that such powers were illegal, that was removed from the rules, and a new set of rules omitting that power were certified. Considering that circumstance, I agree with Mr. *Cotton's* construction of the 19th rule, which contains the only power of borrowing. There is no express power of borrowing; it is quite inferential, and it is in these words: "All persons, whether male or female, excepting persons merely joining the society to invest or deposit money, shall not be entitled to vote at any general meeting of the society, nor be called upon to serve any office." Now, it is obvious that this rule never contemplated borrowing money of what are called outsiders; that is, the world in general. It only meant that the society was to consist of two classes: those who, in the ordinary sense of the word, became members, liable to serve as officers of the society, and who were to become in their turn advanced members or retiring members; and those who joined the society, perhaps illegally and improperly joined the society, merely for the purpose of advancing money. Therefore I think that this rule did not authorize the advance of money by strangers at all; it only contemplated that some members of the society might, instead of taking shares, in the ordinary sense of the word, join the society for the purpose of paying in money on deposit.

This is also shewn by the book which was supplied to every person who made an advance; it is called "Member's Deposit Book;" it is a sort of pass-book, such as is given by a savings bank. Now this book tells every person who holds it that "any person shall be eligible to make deposits, whether male or female,

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adult or minor; and the general rules of the society, so far as they are not superseded by the following, shall be binding on all persons who may make deposits." Mr. *Hardy* says that persons cannot be members who do not take shares in the ordinary way. I am very much inclined to think that that is a correct view of the case, that strictly and properly those who do not take shares cannot be members; but whether that be so or not, I think this is quite sufficient to shew that these persons are fixed with complete notice of the rules of the society, that they are lending money to a benefit building society, which, from its very nature, is not a society having an unlimited power of borrowing money, but as everybody is bound to know (it being the creature of an Act of Parliament), is a society which is only enabled to raise money by subscriptions for shares of a limited amount. The Act limits the amount of the shares to be raised to £150; and I have very seldom, if ever, seen a case in which the amount of the shares exceeded £120. Therefore I think that persons lending money have notice; and if there were any doubt about it, the very first thing told them is, that they are bound by the rules of the society. The 29th rule provides that "any member having received advances on shares shall be held as legally discharged from all connection with this society as soon as he has by his periodical or other payments liquidated and discharged all subscriptions and moneys due from him on account of his said share, according to these rules, and on his depositing his subscription-book with the secretary;" and that "every member not having received any advances shall be entitled to claim the amount he has subscribed, together with the accumulated interest (see rule 20), as soon as he shall have completed his payments, or is desirous of withdrawing; and all his interest in the society shall then cease and determine." Now these gentlemen who are now before me, Mr. *Hill* and Mr. *Jones*, have complied with that rule; they have discharged all their subscriptions, and therefore they are, by the rules of the society, discharged from any further liability; and, for the reasons I have stated, I am of opinion upon the general question, as well as upon the particular rules of this society, that the persons represented by Mr. *Hardy*, having, most unfortunately, advanced their money under these circumstances, cannot stand as creditors of the society under the general law; and even if the general law had been

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in their favour, I am of opinion that they have bound themselves by the rules of the society, and that, consequently, as regards Mr. *Hill* and Mr. *Jones*, and those who are in the same position, it is impossible that any call can be made upon them for the purpose of paying the debts of the depositors. That is the only point I am called upon to decide. I leave the question open as regards the assets of the company; but, as far as my opinion goes, I think that, according to the principle of *In re Cork and Youghal Railway Company* (1), they ought to be paid out of the assets. The cases will be treated as representative cases, and all parties will have their costs out of the estate.

In the latter part of my remarks I should have mentioned that I rely upon the decision of the Lord Chancellor in the case of the *Doncaster Permanent Building Society* (2).

Mr. *Glasse* suggested that the official liquidator should be considered as representing the unadvanced shareholders, and that the order should be, that the depositors were not creditors for the purpose of having a call made upon any of the contributories.

The VICE-CHANCELLOR assented to the suggestion.

Solicitor for *Hill:* Mr. *Wilkinson.*
Solicitor for *Jones:* Mr. *James Pearce.*
Solicitors for the Depositors: Messrs. *Robinson & Preston.*
Solicitors for the Official Liquidator: Messrs. *Burton, Yeates, & Hart.*

(1) Law Rep. 4 Ch. 748. (2) Law Rep. 3 Eq. 158.

V.-C. J.
1870
Feb. 21.

SNOW *v.* TEED.

Will—Power to a Spinster to appoint amongst "her own Family or Next of Kin" —Appointment to a Grand-niece—Valid Appointment.

3 Ch D 673.

A power to an unmarried woman to appoint a fund amongst "her own family or next of kin":—

Held, not to be confined to her statutory next of kin, but to be capable of extension to any relative.

Further consideration.

Catherine Parker, wife of *John Robert Parker*, by her will, dated the 20th of February, 1832, and made in execution of certain powers, appointed freehold estate to the use of trustees and their heirs, upon trust, after the decease of her husband, to sell and stand possessed of the residue of the moneys to arise from such sale, upon trust, after satisfying an annuity, as to one-fifth, to invest the same, and stand possessed of the income upon certain trusts for the benefit of her daughter, *Mary Parker*, for life; and in case (which happened) her daughter *Mary* should die without having been married, "in trust for such of her" (*Mary Parker's*) "own family or next of kin, and in such parts, shares, and proportions, manner and form, as she, my said daughter *Mary*," should by will appoint; and, in default of appointment, and subject thereto, "in trust for the next of kin of my said daughter *Mary* according to the statute for distribution of the personal estate and effects of intestates."

Catherine Parker died on the 31st of December, 1832. *John Robert Parker* died on the 26th of May, 1842.

Mary Parker, by her will, dated the 4th of March, 1863, appointed the above fund unto and amongst her nephew, *Arthur Leopold Parker Snow*, and her three nieces, *Frances Catherine*, *Susan*, and *Charlotte Caroline Augusta Snow*, in certain unequal proportions.

By a codicil dated the 7th of September, 1864, *Mary Parker* revoked the gift of the share given to her niece *Susan Snow*, and gave to *Susan Snow* a life interest in the same, and after her death testatrix bequeathed the share to *Mary Beatrice Snow*, the "god-daughter of my said niece *Susan Snow*."

Mary Parker died on the 23rd of July, 1868.

The bill was filed by *Arthur Leopold Parker Snow* against *John Godfrey Teed*, an original trustee, and *Edmund White*, a subsequently appointed trustee of the will, the statutory next of kin of *Mary Parker*, and *Mary Beatrice Snow*, the goddaughter mentioned in the codicil, who was a daughter of the plaintiff, and hence a great-niece of *Mary Parker*.

One question was, whether the words "family or next of kin" must not be confined to "nearest of kin"; and the other and more important question was, whether the same words could be extended beyond the statutory next of kin so as to let in *Mary Beatrice Snow*.

Mr. *C. M. Roupell*, for the Plaintiff:—

The contention is, that the power is well executed as to all the objects which come within the class of statutory "next of kin"; that is to say, that the power is not confined, on the one hand, to "nearest of kin" so as to exclude the Plaintiff; nor can it be extended by the use of the word "family" beyond statutory next of kin so as to include the Plaintiff's daughter.

The VICE-CHANCELLOR:—I think that "next of kin" cannot be confined to "nearest of kin," but must include the statutory "next of kin." The only question is, whether the word "family" will not include this infant.

Mr. *Roupell*:—The word "family" has been held not to have a larger meaning than "next of kin": *Cruwys* v. *Colman* (1); *Grant* v. *Lynam* (2).

Mr. *Cottrell*, for the Defendants, the next of kin and *Mary B. Snow*:—

Mary Parker was known to the testatrix to be unmarried, so that the only persons who were likely to be her next of kin were her brother and sister and their children. By the word "family," therefore, testatrix must have meant *Mary Parker's* relatives, which would include this child, and the use of the word "or" is alternative, shewing that "family" and "next of kin" do not mean

(1) 9 Ves. 319. (2) 4 Russ. 292.

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the same thing. That her intention was to benefit the grandchild cannot be questioned. The word "family" is a flexible term, and may be narrowed or enlarged by the context: *Jarman* on Wills (1).

Mr. *Fry*, Q.C., and Mr. *Springall Thompson*, for the Defendant *Teed*, the first trustee, were called upon to argue on behalf of the statutory next of kin:—

The grandchild must be excluded, the word "or" being not alternative, but explanatory.

[They referred to *Halton* v. *Foster* (2).]

Mr. *Caldecott*, for the Defendant *White*, the other trustee.

Mr. *Roupell*, in reply, declined, on behalf of the Plaintiff, to argue against the Plaintiff's daughter, *Mary B. Snow*.

SIR W. M. JAMES, V.C.:—

I think, upon the whole, the word "family" must receive its natural meaning.

If the testatrix had used the expression "in trust for such of her own family," she would have expressed herself exactly as, in my opinion, she meant to express herself; that is to say, to give to *Mary Parker* a power of appointing to any person related to her in the ordinary acceptation of the word "family," which would not, strictly speaking, be confined to statutory "next of kin."

There must be a declaration accordingly; the costs of all parties as between solicitor and client, to come out of the entire fifth share; the trustees to have their costs, charges, and expenses properly incurred; but the trustees severing in their defence to have only one set of costs.

Solicitor for the Plaintiff and next of kin: Mr. *W. P. Scott.*
Solicitors for the first Trustee: Messrs. *Dale & Stretton.*
Solicitor for the second Trustee: Mr. *Millman.*

(1) Vol. ii. p. 78, 3rd Ed.

(2) Law Rep. 3 Ch. 505.

DEAN *v.* BENNETT.

V.-C. J.
1870
Feb. 21, 22.

Baptist Congregation and Chapel—Deed of Settlement—Dismissal of Minister—Resolution at Meeting founded on invalid Notice.

By the deed of settlement of a Baptist chapel it was provided that the minister should be liable to be removed by the direction of the church declared at one meeting, and confirmed at a second meeting; that all directions of the church should be declared by a majority of communicants present at a meeting of which notice should have been given in the chapel during divine service on Sunday morning at least four days previously; also that whenever the church should have to consider the appointment or dismissal of a minister, the notice should expressly state the object of such meeting, and each of the directions to be declared at any such meeting should be reconsidered at a second meeting to be convened by public notice to be given in manner aforesaid, expressly stating the object thereof.

On Sunday, the 18th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday "for the purpose of bringing charges against, and considering the dismissal of," the then minister. No copy of the charges was sent to the minister. On the 24th of October the meeting was held, and a resolution was passed that in consequence of certain offences alleged to have been committed by the minister it was agreed that "he is not a fit and proper person to occupy the position of pastor, and that his office as pastor cease forthwith." On Sunday, the 25th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday "for the purpose of confirming and ratifying" the resolutions passed at the meeting of the 24th; and on the 31st of October the meeting was held, and a resolution passed that the minutes of the meeting of the 24th be "passed, confirmed, and ratified":—

Held, that the notice of the 25th of October was invalid in law, because it did not specify the resolutions of the intended confirmation of which it gave notice; and hence that the resolution of the 31st of October, and the dismissal of the minister purported to have been thereby effected, were also invalid.

Semble, the resolution of the 24th of October was also invalid, on the ground that no copy of the charges to be brought against the minister was sent to him.

Affd 6 Ch. 409 L.C.

MOTION for decree.

The sole question for decision at this hearing, was whether the dismissal of the Defendant, the Rev. *Thomas Bennett*, from the office of minister of a church or congregation of Particular Baptists, at *Barnoldswick, Yorkshire*, was or was not valid under the following circumstances:—

By a settlement, dated in 1797, certain lands and hereditaments at *Barnoldswick*, and the chapel or meeting-house erected thereon,

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called the Old Chapel, were vested in trustees upon certain trusts, which contained no provision for the dismissal of the minister of the chapel.

In 1845 the trustees of the Old Chapel were certain persons of whom the survivors, on the 15th of March, 1869, when this bill was filed, were the Rev. *William Fawcett, Samuel Bairstow, George Foster, Henry Dean, John Heap,* and *Joseph Brown.*

On the 7th of July, 1845, an agreement was made between the trustees and Mr. *Bennett,* whereby he agreed to supply the pulpit and discharge the pastoral duties; and it was agreed that "a majority of the members of the church, with a majority of the trustees," should have the power of discharging Mr. *Bennett* on giving him three months' notice.

In 1852 a new chapel was built, and a new deed of settlement, dated the 9th of December, 1852, was executed, which contained the following provisions as to the dismissal of the minister:—

It was provided that every minister of the church should be liable to be forthwith removed by the decision, order, or direction of the church made and declared at one meeting, and confirmed and approved at a second meeting, to be called for that purpose in manner therein mentioned. It was also provided that all decisions, orders, and directions of the church relative to any of the purposes specified and set forth therein, or any other matter or thing whatsoever, should be from time to time made and declared by the male and female members of the said church who should have been communicants for at least a previous period of six calendar months, or a majority of them actually present at a meeting of which notice should have been given publicly in the said chapels, or in one of them, during divine worship on Sunday morning, at least four days before the time of holding such meetings respectively. It was further provided that whenever the church should have to consider the appointment of a minister or ministers, or the dismissal of a minister or ministers, or other matters therein mentioned, the notice, to be publicly given in manner aforesaid, should expressly state the object of such meeting; and each of the decisions, orders, and directions to be made and declared at any such last-mentioned meeting should be reconsidered at a second meeting of the church, to be convened by public notice to be given

in manner aforesaid, expressly stating the object thereof; and such decisions, orders, and directions of each such first meeting should not be construed or held to be binding until confirmed and approved at a second meeting.

The surviving trustees of the settlement of 1852 at the date of the filing of the bill were the Plaintiffs, *Henry Dean*, the Rev. *William Fawcett*, *Samuel Bairstow*, *John Heap*, *Joseph Brown*, and *John Brown*.

After 1852 Mr. *Bennett* officiated as minister of both the old and new chapel.

On Sunday, the 20th of September, 1868, the following notice was read by members of the congregation in both the chapels during divine service:—

"We, the undersigned, being respectively trustees, deacons, and members of the church and congregation of Christians at *Barnoldswick*, in the county of York, commonly known by the name of Particular Baptists, hereby give notice that a meeting of the male and female members of the said church who shall have been communicants for at least a previous period of six calendar months will be held in the Old Chapel belonging to the said church in *Barnoldswick* aforesaid on Saturday next, the 26th day of September instant, at three o'clock in the afternoon, for the purpose of considering the dismissal of the Rev. *Thomas Bennett* as the present minister of the said church, and of making and declaring such decisions, orders, and directions on the subject of the said meeting as the majority of the members present at such meeting may think proper.

"Dated at *Barnoldswick* aforesaid this 19th day of September, 1868.

"*Henry Dean*, *John Brown*, } Trustees.
Thomas Edmondson, *Joseph Wilcock*, } Deacons.
William Berry, *John Edmondson*, } Members."

The meeting of the 26th of September was accordingly held, and a resolution was proposed and seconded to the effect "that the church dismiss the Rev. *Thomas Bennett* from the office of minister on the ground of some statements referring to Mr. *Bennett's* busi-

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ness affairs, and that his ministry cease from this day." To this an amendment was proposed and seconded to the effect "that this meeting adjourns the consideration of the dismissal of the Rev. *Thomas Bennett* from the office of minister for the period of twelve calendar months from the 26th day of September, 1868." The amendment was put and carried by a majority of 59 to 47. The Plaintiffs asserted that the resolution was carried by the votes of persons who had not been communicants for six months previously. The Defendant asserted that of those who supported the amendment there was only one who was not a member of the church and entitled to vote.

On the 28th of September a written demand of a scrutiny was served on the Defendant. The Plaintiffs alleged that the Defendant declined to comply with the demand. The Defendant said that the demand was not signed by any person entitled to vote at a meeting. He admitted he did not at once comply with the demand; but his solicitors, by letters dated the 28th of December, 1868, and the 4th and 7th of January, 1869, and addressed to the Plaintiffs' solicitor, offered on the Defendant's behalf to consent to a scrutiny being made.

On Sunday, the 18th of October, 1868, the following notice was read during morning service in the Old Chapel, and during afternoon service in the New Chapel, by the officiating minister (Mr. *Bennett* having been excluded from the pulpits of both the chapels):—

"We the undersigned, being respectively deacons and members," &c. (stating in the same terms as the former notice that a meeting would be held on Saturday the 24th of October), "for the purpose of bringing charges against and considering the dismissal of the Rev. *Thomas Bennett* as the present minister of the said church, and of making and declaring such decisions, orders, and directions, on the subject of the said meeting as the majority of the members present may think proper, or any other business.

"Dated at *Barnoldswick* aforesaid, this 18th day of October, 1868.

"*Joseph Wilcock*,
"*Thomas Edmondson*, } Deacons.
"*John Edmondson*,
"*William Berry*, } Members."

On the 23rd of October the Defendant caused a counter-notice to be served upon *Thomas Edmondson, John Edmondson, William Berry,* and *Joseph Wilcock,* giving them notice "that the object named" in the notice read on the 18th of October, for a meeting on the 24th, "is illegal, and the notice is illegal," and that "any act done by the said meeting will be of no effect."

On the 24th of October, 1868, a meeting was held at which a resolution was passed as follows: "That in consequence of Mr. *Bennett* and his party not agreeing to subject the votes of the church-meeting held the 26th of September, 1868, to a scrutiny, we hereby declare that all the resolutions relating to his continuance in office as pastor be rescinded." Another resolution was that in consequence of certain offences therein alleged to have been committed by Mr. *Bennett,* the meeting unanimously agreed "that he is not a fit and proper person to occupy the position of pastor, and that his office as pastor cease forthwith."

On Sunday, the 25th of October, the following notice was read by the officiating minister at the Old Chapel during morning service, and also during afternoon service at the New Chapel:—

"We the undersigned, being respectively deacons and members," &c. (stating in the same terms as the former notices that a meeting would be held on Saturday, the 31st of October), "for the purpose of confirming and ratifying the resolutions passed at the church-meeting held the 24th of October, 1868.

"Dated at *Barnoldswick* aforesaid this 25th of October, 1868.

"*Joseph Wilcock,*
"*Thomas Edmondson,* } Deacons.
"*William Berry,*
"*John Edmondson,* } Members."

On the 31st of October, accordingly, the meeting was held, and a resolution to the effect that the minutes of the meeting of the 24th of October "be passed, confirmed, and rectified," was unanimously carried.

The bill prayed that the Defendant might be restrained from taking or endeavouring to take possession of the pulpits in the chapels at *Barnoldswick,* vested in the Plaintiffs as trustees of the settlements of 1852, or either of them, and from acting or offici-

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ating in any manner whatsoever as minister thereof, and from in any way disturbing or interfering with the performance of divine worship in the chapels, or either of them, and from in any manner intermeddling or interfering with the trust property vested in the Plaintiffs by the new deed of settlement.

On the 8th of May, 1869, a motion for an injunction was made, and ordered to stand to the hearing, on the Plaintiffs' undertaking not to allow anybody to preach in the New Chapel without the Defendant's consent.

The Defendant filed his answer on the 17th of June, 1869, denying the validity of the dismissal, and the bill was amended on the 10th of July.

Mr. *Amphlett*, Q.C., Mr. *Fry*, Q.C., and Mr. *Ingle Joyce*, for the Plaintiffs, cited *Perry* v. *Shipway* (1).

Mr. *Kay*, Q.C., and Mr. *Wickens*, for the Defendant, were not called upon.

SIR W. M. JAMES, V.C.:—

In this case the bill has been filed for the purpose of having it declared that the Defendant has been properly removed from his office as minister, and for an injunction consequent upon that declaration.

The whole matter resolves itself into a very simple question as to the validity of the dismissal purported to have been effected by resolutions of two meetings convened by two notices.

The first notice appears to me to have been properly and sufficiently given by persons properly and sufficiently authorized to call meetings of this congregation, and it was a meeting summoned "for the purpose of considering the dismissal of the Rev. *Thomas Bennett*" (this was a meeting preliminary to the two upon which reliance is placed) "as the present minister of the said church and of making and declaring such decisions, orders, and directions on the subject of the said meeting as the majority of the members present at such meeting may think proper." At that meeting, by a majority, the consideration of the question was post-

(1) 1 Giff. 1; 4 De G. & J. 353.

poned for a period of twelve months, which does not seem to me to have been a reasonable or proper mode of dealing with the question; and therefore I am not surprised that the persons who were dissatisfied took an opportunity of summoning another meeting.

They did so accordingly, by a notice which was as follows:— "We the undersigned do summon a meeting for the purpose of bringing charges against and considering the dismissal of the Rev. *Thomas Bennett*, as the minister of the said church." That seems to have been signed also by persons duly authorized to summon such a meeting. Now, "the purpose of bringing charges against" a person is a matter which requires that everything shall be done according to the forms and principles of justice; and it appears to me that if a meeting was summoned for the purpose of "bringing charges," those charges ought to have been communicated to Mr. *Bennett* before the meeting was called, that he might have an opportunity of knowing what he was to meet. At that meeting a resolution was passed rescinding the resolution of the previous meeting, upon the ground that a scrutiny had not been given. Of the intention to pass such a resolution no notice whatever was given.

The second resolution was that, in consequence of Mr. *Bennett* having done various serious matters which are alleged against him, he was not a fit and proper person to occupy his position, and that his office should cease forthwith.

It does not appear by what evidence those charges were supported or in what way they were investigated, or that any evidence was given in respect of them except that a certain person who was present, and who appears to have taken a very active part in the proceedings of this disturbed congregation, was required to read some remarks which were made by a Commissioner in Bankruptcy. That certainly is not a mode in which anybody ought to be tried for any offence, or to be convicted. Those resolutions were however passed, and then it is said a subsequent meeting was held for the purpose of confirming those resolutions, and that those resolutions were duly confirmed accordingly.

Now, I hold that that second notice was insufficient and invalid in point of law, because, it being a notice to confirm resolutions, there was no way in which the congregation could be informed of

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the resolutions, and the only mode by which that notice could have been properly given was a notice intimating the resolutions which had been passed and convening a meeting for the purpose of considering those resolutions.

The second meeting for confirming the resolution therefore is void, and upon that ground I am of opinion that the Plaintiffs' bill has failed and must be dismissed with costs, which will include the costs of the motion.

Solicitors for the Plaintiffs: Messrs. *R. & W. B. Smith*, agents for Mr. *George Robinson, Skipton.*

Solicitors for the Defendant: Messrs. *Ridsdale & Craddock*, agents for Messrs. *Richardson & Turner, Leeds.*

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In re MAGUIRE.

Will—Charity—Cy-près.

Testatrix made several bequests to charitable institutions, and, amongst others, to the *C. P. A. Society* in *England*, and to the *C. P. A. Society* in *Ireland*. There was no such society as the *C. P. A. Society* in *Ireland*, but the *S. A. Society* for *Ireland*, to whom a bequest had been made, was founded for similar objects and with rules almost identical with those of the *C. P. A. Society* in *England*:—

Held (the Attorney-General not objecting), that the bequest might be paid to the *S. A. Society* for *Ireland.*

SUSANNA MAGUIRE, spinster, by her will, dated the 12th of February, 1855, bequeathed out of her Government Stock

£200 unto the *Church Education Society* in *Ireland;*

£200 unto the *Additional Curates' Aid Society* in *Ireland;*

£300 unto the *Society for the Propagation of the Gospel in Foreign Parts;*

£100 unto the *Exeter Diocesan Board of Education;*

£300 unto the *Society for Employment of Additional Curates* in *England;*

£300 unto the *Church Pastoral Aid Society* in *England;*

£200 unto the *Church Pastoral Aid Society* in *Ireland.*

By a codicil to her will, the testatrix directed that each of the

charitable legacies given by her will should be primarily charged on her pure personalty, in priority to all other payments thereout.

Miss *Maguire* died in November, 1866.

The charitable legacies, with the exception of that to "*The Additional Curates' Aid Society in Ireland*," and that to "*The Church Pastoral Aid Society in Ireland*," had been paid, and a sum to answer these legacies had been set apart by the executors, and paid into Court.

It appeared that a society was formed in 1839 under the name of "*The Additional Curates' Fund Society for Ireland.*" At the annual general meeting of the society, held at *Dublin* on the 30th of March, 1865, a resolution was passed changing the name to "*The Spiritual Aid Society for Ireland.*"

There had never been any society in *Ireland* called "*The Church Pastoral Aid Society.*"

Upon a summons taken out by the *Spiritual Aid Society for Ireland,* claiming payment of the legacy bequeathed to the *Additional Curates' Aid Society,* an order had been made for payment to the *Spiritual Aid Society.*

The executor had taken out a summons for payment to him on behalf of the legatees other than charities of the legacy to the *Church Pastoral Aid Society in Ireland;* the general legacies having had to abate.

An affidavit was made by the Archbishop of *Dublin,* one of the vice-presidents of the *Spiritual Aid Society,* stating that the objects of the *Church Pastoral Aid Society,* which was established in *England,* and did not extend its operations to *Ireland,* were similar to those of the *Spiritual Aid Society,* being directed to making annual grants towards the maintenance of additional curates in places in need of such assistance, and that the *Spiritual Aid Society* was the only society existing at the date of the will, or now existing, which could carry out the object and intention of the testatrix with regard to the legacy bequeathed to the *Church Pastoral Aid Society in Ireland.*

Mr. *W. Pearson,* for the executor, in support of the summons:—

Where the testator shews an intention not to give to charity generally, but to benefit a particular institution, and that institu-

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tion cannot be found, the Court will not apply the bequest *cy-près*. The doctrine of *cy-près* being only applicable (*a*), where there is a general charitable intention, but no mode of application, or (*b*), where a legacy is given to trustees for undefined objects. In this case the testatrix has pointed out two distinct societies, one of which is not, and never has been in existence; and on no principle can the other society be allowed to take the legacy, which has already lapsed for the benefit of the general legatees.

Mr. *T. C. Wright*, for the *Spiritual Aid Society*, claimed the legacy on the ground that this society, which carried on its operations in *Ireland*, was founded for the same objects and with almost identical rules, as the *Church Pastoral Aid Society in England*; and that the object of the testatrix was not so much to benefit a particular society, as to promote a particular cause: *Loscombe* v. *Wintringham* (1); *Fisk* v. *Attorney-General* (2); *In re Clergy Society* (3).

Mr. *Wickens*, for the Attorney-General, contended that there was a sufficient indication of a general charitable purpose to induce the Court to administer the bequest *cy-près*. In cases where the society the particular object of a testator's bounty has ceased to exist, or where it has refused the gift, the gift will be applied according to a scheme in favour of the general intention: *Reeve* v. *Attorney-General* (4); *Hayter* v. *Trego* (5); *Tudor* on Charitable Trusts (6).

Mr. *Pearson*, in reply, contended that no distinction could be drawn between a legacy to a person, who died in the testator's lifetime, and one to a person who could not be found. In either case the legacy lapsed: *Fisk* v. *Attorney-General* (7); *Jarman* on Wills (8).

SIR W. M. JAMES, V.C.:—

The intention of the testatrix to devote this sum to charity, and also the particular object of the charity, are sufficiently indicated

(1) 13 Beav. 87.
(2) Law Rep. 4 Eq. 521.
(3) 2 K. & J. 615.
(4) 3 Hare, 191.
(5) 5 Russ. 113.
(6) Pages 212, &c.
(7) Law Rep. 4 Eq. 521, 528.
(8) Vol. i. p. 528, 3rd Ed.

by the name of the society itself, and by the place in which the legacy is found among other legacies to charity. There can be no doubt of the intention of the testatrix to provide for the objects embraced by the *Spiritual Aid Society*, and it follows from *Loscombe* v. *Wintringham* (1) and *In re Clergy Society* (2), that this is a perfectly good charitable bequest. In *Fisk* v. *Attorney-General*, Vice-Chancellor *Wood*, in reference to a legacy to a charity, which had been dissolved in the lifetime of the testatrix, observed (3): "I am far from saying that that argument may not some day or other require further consideration; but there are two decisions, one by Vice-Chancellor *Kindersley* of *Clark* v. *Taylor* (4), the other by Vice-Chancellor *Stuart* of *Russell* v. *Kellett* (5), which expressly decide that when a gift is made by will to a charity which has expired it is as much a lapse as a gift to an individual who has expired." I certainly do not intend myself to go further than Vice-Chancellor *Wood* did, but in this case there is a clear intention by the testatrix to effect a particular object of charity—pastoral aid in *Ireland*—which is carried out by the society now claiming it. I apprehend the Attorney-General will not object, and there will be an order for payment of the legacy to the *Spiritual Aid Society for Ireland* to be applied for the purposes of Church pastoral aid in *Ireland*.

Solicitors: Messrs. *Bothamleys & Freeman*; Messrs. *Raven & Bradley*; Mr. *W. Moon*.

(1) 13 Beav. 87.
(2) 2 K. & J. 615.
(3) Law Rep. 4 Eq. 528.
(4) 1 Drew. 642.
(5) 3 Sm. & Giff. 264.

V.-C. J.

1870

March 25, 28.

BOWES *v.* LAW.

Covenant not to erect "Buildings"—Garden Wall—Vinery—Injunction—Damages—Parties.

Plaintiff, in 1866, took a conveyance of a piece of land bounded by a road, from a vendor, who covenanted that "no buildings," except dwelling-houses, not to cost less than £200 each, to front with the road, should be erected on the opposite side of the road to the Plaintiff's land. Defendant, in 1869, agreed to purchase from the same vendor the land on the opposite side of the road to the Plaintiff's land; he also agreed to make a permanent fence around the land so agreed to be purchased, either by railing or walling, from four to seven feet high; and he further agreed to enter into a covenant with the vendor similar to that which had been entered into by the Plaintiff.

Afterwards the Defendant, having thrown the land so agreed to be purchased into pleasure ground, built a garden wall alongside the road, 8 ft. 6 in high; and in one part 11 ft. high; behind which part he also erected a vinery, with a roof leaning against the wall:—

Held, that the building of the wall to the height of 8 ft. 6 in. was not a breach of the covenant:

Held, further, that the building of the wall to the height of 11 ft., and the erection of the vinery, were breaches of the covenant.

Mandatory injunction refused and damages awarded.

The conveyance to the Defendant had not been executed:—

Held, nevertheless, that the vendor, who had been made a Defendant, was not a necessary party; and Plaintiff ordered to pay his costs.

MOTION for decree.

In October, 1866, the Plaintiff, *Thomas Bowes*, purchased of the Defendant, *George Allison*, a freehold mansion-house and hereditaments, called *Monk End Hall and Estate*, in the parish of *Croft*, near *Darlington*, *Yorkshire*, and by a deed dated the 29th of October, 1866, *George Allison*, in consideration of £1800, conveyed the said mansion-house, estate, and hereditaments, to the use of *Thomas Bowes*, his heirs and assigns, for ever. By the same deed *George Allison*, for himself, his heirs, executors, and administrators, covenanted with *Thomas Bowes*, his heirs and assigns, that "no buildings except dwelling-houses to front with *Carlton Terrace* shall be erected or built on any of the lots numbered 30 to 47, both inclusive, on the plan thereinbefore referred to, and shall not be of a less cost than £200 for each house on each lot."

Carlton Terrace was a road or street, then intended to be, and

shortly afterwards made, bounding the *Monk End Estate* on the south, and dividing the purchased land from lots 30 to 47.

In the year 1869 the Defendant, the Rev. *Frederick Henry Law*, Vicar of *Croft*, entered into an agreement with *George Allison*, dated the 9th of February, 1869, whereby Mr. *Law* agreed to purchase for £1050 all that property described above as "the lots numbered 30 to 47, both inclusive," and the adjoining property, bounded on the north by *Carlton Terrace;* and by the same agreement the purchaser agreed "to make a permanent fence . . . around the premises purchased, to the satisfaction of the vendor or his agent, either by railing or walling from four to seven feet high." It was further agreed as follows: "No out-offices to be made facing any of the public streets or roads at a less distance than 30 ft. from such streets or roads." The agreement also recited that the vendor had already entered into a covenant with *Thomas Bowes*, in the terms above-mentioned; and proceeded as follows: "And the purchaser of the said lots numbered from 30 to 47 inclusive, in the said plan hereupon indorsed, hereby agrees to enter into a similar covenant with the vendor, to indemnify him from any damage, cost, or injury he may sustain by any breach of the same."

The bill was filed on the 28th of August, 1869, by *Thomas Bowes*, against the Rev. *Frederick Henry Law* and *George Allison*, alleging that the Defendant *Law* had caused workmen to commence digging foundations for a wall fourteen feet high or thereabouts, along *Carlton Terrace*, fronting the said lots numbered 30 to 47 inclusive, and also to commence operations for erecting a greenhouse, vinery, stables, and coach-house on the same plots; that by so doing contrary to the terms of the covenant, he had caused great damage and injury to the property of the Plaintiff; that if such buildings and wall were allowed to be erected and continue erected, the character of the Plaintiff's property would be entirely altered and much depreciated; that *Carlton Terrace* would have only the appearance of a back road instead of a street with dwelling-houses in it; and that such wall would prevent the Plaintiff from building on his own property houses of the class intended to be erected by him.

The bill prayed that the Defendant *Law* might be restrained

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from building and erecting or permitting to remain or continue built or erected on the said plots, any buildings or erections, or wall or walls, contrary to the covenant, to the damage and injury of the Plaintiff; and that the Defendant *Law* might be ordered to pull down and remove any such buildings or erections, wall or walls from the same premises.

From the affidavits in support of the injunction, which was moved for on the 17th of September, 1869, it appeared that Mr. *Law* had raised the boundary wall of the lots numbered 30 to 47, to a height of 8 ft. 6 in.; except in one place, where he had made an opening for, and had put up a pair of wooden back-yard or stable-yard doors, and in another part about sixty or seventy feet in length, where he had raised the wall to eleven feet in height, for the purpose of making a vinery on the inner or south side, with a glazed lean-to roof against the wall.

The motion was ordered to stand over till the second seal day in Michaelmas Term, on the Defendant's undertaking; and on the 11th of November was ordered to stand till the hearing, the Defendants undertaking to do nothing contrary to the notice of motion.

Mr. *Kay*, Q.C., and Mr. *Dewsnap*, for the Plaintiff:—

Where the construction of a contract is clear, and the breach is clear, the breach is sufficient ground for the interference of the Court: *Tipping* v. *Eckersley* (1).

That the building of a wall fifteen feet high at right angles and close up to a street is a breach of a covenant "not to erect any building" within the distance of six feet from a street appears from *Child* v. *Douglas* (2).

Coles v. *Sims* (3) is an authority to shew that such a covenant as this may be enforced in this Court.

Mr. *Amphlett*, Q.C., and Mr. *Kekewich*, for the Defendant *Law*:—

The Court will look to the real object of the covenant, which was to prevent a class of houses lower than such as can be built for £200 each from being built. A wall eight feet high would be a

(1) 2 K. & J. 264.

(2) Kay, 560; 5 D. M. & G. 739.

(3) 5 D. M. & G. 1, 8.

greater benefit to the Plaintiff than a row of cottages costing no more than £200, and the Defendant is entitled to a fence of some sort; indeed he had stipulated to make a wall from four to seven feet high. What he has actually done is to build to 8 ft. 6 in. high, and to eleven feet where he has placed the vinery. That is not such a building as the Court will interfere with; the question being always, as Lord Justice *Turner* said in *Child* v. *Douglas*, a question of "balance of inconvenience."

The object of the covenant in *Child* v. *Douglas* was very different from that of the covenant here. There the object was to keep back the frontage of area of houses six feet from a road, and what the Defendant did was to bring a side boundary wall, at first only five feet high, at right angles up to the road. This was not objected to, but when he went on to raise this boundary wall to a height of fifteen feet, the Plaintiff complained, and the Court interfered, but the bill was ultimately dismissed (1).

Is a wall a "building?" Lord Chancellor *Hatherley*, in *Child* v. *Douglas*, clearly must have held it might be, but this view was not supported by the Lords Justices on appeal. It is submitted that a covenant by a tenant farmer to keep buildings in repair would not be held to include walls. In *Morish* v. *Harris* (2) it was doubted even whether a space inclosed by four stone walls and roofed over, in which guano and other manures were kept, was a "building" or not.

It must, perhaps, be admitted that a vinery is a "building," but this building is entirely screened from view by the wall.

The Plaintiff must shew some substantial damage.

[They also referred to *Keates* v. *Lyon* (3).]

Mr. *Spencer Butler*, for the Defendant *Allison*.

Mr. *Kay*, in reply:—

There is no substantial difference between this case and *Child* v. *Douglas*. In *Child* v. *Douglas* the covenant was that nothing should be built within six feet of the road; here it is that if £200 cottages or houses are not built nothing shall be built. The

(1) 2 Jur. (N.S.) 250. (2) Law Rep. 1 C. P. 155.
(3) Law Rep. 4 Ch. 218.

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object here was to have the houses built in one line close up to the road.

The Defendant *Law* contends, first, that he may build a wall eleven feet high, and then that he may put anything which has a lean-to roof behind that wall. If so, he may erect cow-houses, even the poorest class of brickmakers' cottages, and so eat away the covenant piecemeal.

Tipping v. *Eckersley* (1) shews that an injunction may be granted for a breach of contract where damage is not alleged, if it be for the purpose of asserting a right.

The VICE-CHANCELLOR referred to *Duke of Bedford* v. *Trustees of the British Museum* (2).

Mr. *Kay:* That was the case of an equitable release of the covenant. Here we have done nothing to release the covenant.

The VICE-CHANCELLOR said he was satisfied as to the vinery.

Mr. *Kay:* Then all that remains is the wall, and we say a wall of any height, but particularly where it is eleven feet high, is a "building" within the meaning and intention of the covenant.

SIR W. M. JAMES, V.C.:—

In this case the Plaintiff alleges and proves that he has purchased a mansion-house, and has also purchased certain pieces of land as pleasure grounds to that house, and which, as far as appears, are intended to be kept as grounds belonging to the mansion-house. These pieces of land are bounded by a road called *Carlton Terrace*, and with respect to *Carlton Terrace* the Plaintiff's vendor is bound by a covenant "that no buildings except dwelling houses to front with *Carlton Terrace* shall be erected or built on any of the lots numbered thirty to forty-seven, both inclusive, on the plan thereinbefore referred to, and shall not be of a less cost than £200 for each house on each lot." No houses have in fact ever been built on any part of these lands, and the whole of that piece of property, being the lots numbered 30 to 47, both inclusive, has been bought by the Defendant, the Rev. *Fre-*

(1) 2 K. & J. 264. (2) 2 My. & K. 552.

derick Henry Law, with a view to its being thrown into the gardens of a rectory adjoining. The Defendant has proceeded to inclose the whole of the ground with a wall eight feet high, and in part eleven feet high, for the purpose of erecting a vinery. The Plaintiff himself has bounded his own land with a brick wall seven feet high running along *Carlton Terrace*.

The Plaintiff has instituted this suit for the purpose of getting a mandatory injunction to remove the Defendant's wall and vinery, and the question I have to consider is, whether in building a wall the Defendant has committed a breach of the covenant into which he also has agreed to enter, that "no buildings except dwelling houses to front *Carlton Terrace* shall be erected or built on" the property.

Now the word "buildings" is perhaps an ambiguous expression, and certainly in its ordinary way it does not signify a wall. I certainly think that the repairing or reinstating of buildings would include the repairing or reinstating of a garden wall, or of a wall enclosing or defining some portion of a field, as is to be found in some parts of the country. It may be that in a covenant of this kind the word "buildings" may have a more restricted meaning, but I observe that in *Child* v. *Douglas* (1) the word "building" was held to apply to the erection of a very high wall rising to some fifteen feet. A difference of opinion certainly was expressed by one of the learned Judges (Lord Justice *Knight Bruce*), and no concurrence of opinion was expressed by the other (Lord Justice *Turner*); and the learned Judge (Lord Chancellor *Hatherley*) who decided the point, said that, whilst he was of opinion that a wall fifteen feet high would be an infringement, he doubted whether the covenant would prevent the erection of a wall five feet high, and he was satisfied that a wall two feet high with an iron railing upon it was not, at all events, such a building as the Court would interfere with.

In this case, sitting as judge and jury, I have to consider whether the erection of a boundary wall, including the portion of it of increased height, where the vinery is placed, is a breach of the covenant. The lower portion of the wall is 8 ft. 6 in. high, which is not an unusual or improper height, or different in these respects

(1) Kay, 560; 5 D. M. & G. 739.

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from a wall two feet high and surmounted by a railing, as suggested by the Lord Chancellor in *Child* v. *Douglas*. I am of opinion that such a wall as this, built *bonâ fide* as a boundary of a garden, is quite as proper and justifiable as the wall four feet high with the iron railing upon it, referred to in the judgment in that case. Therefore, I am of opinion as regards the wall, that as to that part of the prayer which asks that the Defendant be ordered "to pull down and remove any . . . wall or walls from the same premises," the suit has failed; and I may observe that the draftsman has been obliged to add the words "wall or walls," wishing to bring them within the terms of the injunction, though the covenant has the word "buildings" only. I think that the suit so far as that goes has failed.

But I am of opinion that the erection of a vinery, and the making of the wall of a greater height at that spot is a clear infraction of the covenant against "buildings," except of the specified class. If this were allowed, merely because the roof of the vinery is constructed as a lean-to against the wall, the Plaintiff might be deprived of the benefit of his covenant by the erection in a similar way of a stable, a cow-house, or anything else which might be built against the wall, and which might cause the very injury to the property sought to be provided against, namely, the erection of some offensive or injurious building instead of or in addition to the erection of houses of the value of £200 or upwards.

The Plaintiff therefore, it appears to me, was well founded as far as regards the vinery; and the question for the Court is, what ought to be done; whether a mandatory injunction ought to be granted, or whether the alternative jurisdiction, which has been given to the Court by recent legislation, should be resorted to. I am of opinion, having regard to all the circumstances, and considering that no substantial annoyance has been occasioned to the Plaintiff, and no substantial injury done to any right of property of his, that a declaration will be sufficient for the purpose of protecting the title, and I do not think it necessary to give the Plaintiff the power of doing such an unreasonable and unneighbourly act as that of taking down this vinery, which is a great convenience to the Defendant, and the taking down of which would not confer on the Plaintiff himself any benefit.

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I propose, therefore, to declare that the erection of a boundary wall on the piece of ground is no breach of the covenant in the bill mentioned, but that the raising of the wall for the purpose of placing, and the placing against it of a vinery, are breaches of the covenant; but that under the circumstances of the case, the Court does not think fit to order the removal thereof, and assesses the damages in respect thereof at forty shillings. Then there must be an injunction to restrain the Defendant *Law* from making any further addition to the wall or vinery beyond putting a coping to the wall, or from committing any other breach of the covenant; and the Defendant *Law* must pay the costs of the suit, except the costs of the Defendant *Allison*, who was not a necessary party and whose costs must be paid by the Plaintiff.

Solicitor for the Plaintiff: Mr. *A. Burn*, agent for Mr. *F. T. Steavenson, Darlington.*

Solicitors for the Defendant *Law:* Messrs. *Cree & Last*, agents for Messrs. *Newby, Richmond & Watson, Stockton-on-Tees.* Solicitors for the Defendant *Allison:* Messrs. *Clarke, Son, & Rawlins*, agents for Messrs. *Allison, Son, & Willan, Darlington.*

In re MANCHESTER AND LONDON LIFE ASSURANCE AND LOAN ASSOCIATION.

V.-C. J. 1870 *March* 14.

Winding-up—Transfer of Business—Novation—Practice—Service.

In 1862 the business and assets of life assurance company *C.* were transferred to company *B.*, and in 1865 the business and assets of company *B.* were transferred to company *A.*, which was ordered to be wound up in 1869. Premiums continued to be paid until 1865 at the original office of *C.*, and the form of the receipts given indicated an incorporation or union between *B.* and *C.*, rather than a transfer of business, and the dissolution of *C.* From 1865 the premiums were paid at the office of *A.*, and the receipts were headed as of that company:—

Held, upon the evidence afforded by the premium receipts (in the absence of any evidence of notice of the transfer from *C.* to *B.*, or assent thereto by the creditor), that there had been no novation so as to preclude the representatives of a policy-holder in *C.* from enforcing their claim upon the policy by a winding-up order:

Held, also, that no novation having been established as to the first transac-

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tion between *C.* and *B.*, the creditors of *C.* remained unaffected by any subsequent transactions between *B.* and *A.* to which *C.* was no party, even though notice of such transactions was brought home to them.

A Petition to wind up a company which has transferred its business and been dissolved eight years ago, must be served upon some of the members, officers, or servants of the company, and the Court refused to make any order upon a Petition which had only been served at the place where the company carried on business eight years before.

TWO Petitions were presented for winding up the *Manchester and London Life Assurance and Loan Association*, which, in February, 1862, transferred its business and assets to the *Western Life Assurance Society*, which society became amalgamated with the *Albert Life Assurance Company* in 1865.

The first Petition, that of *Pike* and *Shayler*, was the joint Petition of a policy-holder and a shareholder in the *Manchester Association*.

Mr. *Fry*, Q.C., and Mr. *F. Waller*, appeared in support of this Petition.

Mr. *Everitt*, for the two remaining directors of the *Manchester Association*, who had been served with the second but not with the first Petition, took the objection that this Petition had not been properly served, the only service upon the company having been upon a workman who was employed upon the site, 77, *King Street*, *Manchester*, where the office now pulled down had formerly stood (1).

Mr. *Fry*, Q.C., contended that there had been a sufficient service by serving the Petition at the last registered office of the company,

(1) By Rule 3 of the General Order of the 11th of November, 1862, it is provided that:—

"Every such Petition shall, unless presented by the company, be served at the registered office, if any, of the company, and if no registered office, then at the principal or last known principal place of business of the company, if any such can be found, upon any member, officer, or servant of the company there; or in case no such member, officer, or servant can be found there, then by being left at such registered office or principal place of business, or by being served on such member or members of the company as the Court may direct; and every Petition for the winding-up of a company, subject to the supervision of the Court, shall also be served upon the liquidator (if any) appointed for the purpose of winding up the affairs of the company.

and as two of the directors now appeared there could be no doubt that the Petition had reached the proper hands.

The VICE-CHANCELLOR held that the service was insufficient. The Petition ought to have been served upon some of the directors or members of the company, and it was not enough to go and serve it at a place which eight years ago was the registered place of business of the company. The objection was fatal, and he could not make any order upon that Petition.

The second Petition was the Petition of *Thompson* and others, the representatives of *Charles Bartlett*, deceased, a policy-holder in the *Manchester Association.*

In October, 1860, *Bartlett* effected a policy upon his own life for £500 with the association then carrying on business at 77, *King Street, Manchester.*

In February, 1862, the business and assets of the association were transferred to the *Western Life Assurance Society.*

On payment of the premium in 1862 (at 77, *King Street, Manchester*), the receipt given was headed:

"*Manchester and London Life Assurance and Loan Association,*" after which was printed in smaller type and red ink, "Incorporated with the *Western Life Office of London*, established 1842:" "*Manchester* Office, 77, *King Street;*" and in the body of the receipt the premium was described as "for the renewal of an assurance effected by the above-named policy in the *Manchester and London Life Assurance Association.*"

The receipts for 1863 and 1864 were headed:

"*Western Life Assurance Society.* Established 1842.
"With which are united,
"*The Manchester and London Life Assurance Society; and the*
"*Metropolitan Company's Life Assurance Society.*
"Chief Offices: 3, *Parliament Street*, and 77, *King Street,*
"*Manchester.*"

In these receipts the policy was described by the number simply.

In July, 1865, the *Western* became amalgamated with the

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Albert, and the receipt for the premium paid in October, 1865, was in the following form:

"*Western, Manchester, and London Life Assurance Society.*
"Chief Offices: 3, *Parliament Street, London*, and 77, *King Street*, "*Manchester.*"

Incorporated
with the
Albert Life Assurance Company,
7, *Waterloo Place, London.*

The subsequent receipts were headed:

"*Albert Life Assurance Company*, 7, *Waterloo Place, London, S.W.*
"Established 1838."

Bartlett died on the 7th of February, 1869, and this Petition was presented by his executors.

No indorsement of the transfers had been made upon *Bartlett's* policy; no bonus had ever been received, and the receipts for the premiums were the only documents relating to the policy found amongst his papers after his death.

Mr. *A. Bailey* (Mr. *Morgan*, Q.C., with him), in support of the Petition, relied upon *In re Family Endowment Society* (1), and distinguished *In re Times Life Assurance Company* (2), and *In re National Provincial Life Assurance Society* (3).

Mr. *Everitt* for the two directors of the *Manchester Association*, who had been served with the Petition, but without leave obtained from the Court.

[The Vice-Chancellor gave leave *nunc pro tunc.*]

Mr. *Everitt* contended that the policy-holder had accepted the liability of the new company, and that complete novation was established.

(1) Law Rep. 5 Ch. 118. (2) Law Rep. 9 Eq. 382; Ibid. 5 Ch. 381.
(3) Law Rep. 9 Eq. 306.

Mr. *Kay*, Q.C., and Mr. *Higgins*, for the liquidators of the *Albert*, also opposed the Petition:—

Knowledge and acquiescence are brought home to the policy-holders by payment of the premiums from 1862 to 1865 to the *Western Society*, and then from 1865 to 1869 to the *Albert Company*. Even if the *Manchester Association* had authorized the policy-holder to pay his premiums to the *Western*, as their agents, there was no such authorization with respect to the *Albert*, and the form of the receipts taken from the *Albert* shewed that the policy-holder had accepted their liability, and looked to them as his debtors in respect of the policy. *In re National Provincial Life Assurance Society* (1).

Mr. *Eddis*, Q.C. and Mr. *Cracknall*, for the *Western Society*, also opposed the Petition:—

The *Manchester Association* was dissolved in 1862, in accordance with the provisions of the deed of settlement, which was binding upon the policy-holders, and consequently there has been a valid dissolution, and the company, making the transfer, is at once discharged of all liabilities (including liability for payment on a policy on a life not yet dropped) which are accepted by the transferee company: *In re Times Life Assurance and Guarantee Company* (2).

[The VICE-CHANCELLOR:—If I used the words which you have been reading, I retract them. I may have said so, but if I did it was *per incuriam*.]

Mr. *Cracknall* explained that he had been reading from the head-note (3). At all events, payment of the premiums to the directors of the *Albert* would give the policy holder in the *Manchester Association* a right as against the *Albert*, while the *Albert* would have had no defence to a claim upon them in respect of this policy.

SIR W. M. JAMES, V.C.:—

In this case the Petitioner is entitled to an order. The policy-holder, whom the Petitioner represents, effected his policy in the

(1) Law Rep. 9 Eq. 306.
(2) 18 W. R. 404.
(3) The portion of the head-note cited has been corrected in a subsequent number of the Weekly Reporter.

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Manchester and London Life Assurance Association. That association made some arrangement by which they transferred their business, it is stated, to the *Western Life Office.* It is said that that in some way or other had deprived the policy-holder of his remedy against the office that undertook to pay him the amount assured The person who assured his life does not appear to have been in any way a party to, or to have been affected with notice of any change, except that which would arise from the receipt that was given to him. Now, the novation, if any, as between the *Manchester* and the *Western* offices must have occurred about 1862, when the transfer took place, but it appears to me that the greatest possible care was taken to prevent any such novation, so far as regards the offices and the persons who assured with them, because it is singular in this case that whereas the *Manchester* is alleged to have been dissolved, to have entirely ceased to exist in 1862, from the same office and the same place (77, *King Street, Manchester*), a receipt is afterwards given, headed in large letters as before, "*Manchester, &c., Association,*" with which, it is true, there is written, in smaller characters and in red ink—not transferred to, but—"Incorporated with the *Western Life Office* of *London.* Established 1842." The receipt therefore continues to be still the receipt given from the same office to which the assured had paid the premiums before, is for the same policy, and is headed "*Manchester and London Life Assurance Association.*" [His Honour, after mentioning the change of form in the next receipt, continued]:—

And so it goes on until there was a subsequent bargain with the *Albert.* Up to this time the premiums were paid to the same office at the same place as he had paid them before, receiving in the first instance a receipt from the office in the name of the office, and then from an office with which it is said the other is united. There is no trace whatever, no suggestion that there was a transfer of the business or a dissolution of the company, or anything more than that the two offices were carrying on business together. It would be a very strong thing indeed to say that a policy-holder is to be deprived of his remedy against the persons with whom he contracted, because those persons entered into an arrangement of that kind and only gave that notice.

Then it is very difficult to see how any novation could after-

wards occur by the transaction between the *Western* and the *Albert*. He was no creditor of the *Western*, because, up to that time he was still a creditor of the *Manchester*. In order to constitute a novation it must be tripartite, the creditor, the original debtor, and the new debtor must all be parties to it. The *Manchester* was no party to anything, as between their creditors and the *Albert*, and it is impossible upon any principle to hold that there was any novation effected as between their creditor and the *Albert*. He retained his right against the *Manchester* and is not affected, according to my view, by anything that the company had done with the *Western*, and he could not be affected by anything which the *Western* had done with the *Albert*. It is true he went on paying to the *Albert*, at the place where he was told in the ordinary course of business he ought to pay it. It appears to me monstrous that a person having a contract of this kind is to be told that he has lost his right under his original contract, and must take such remedy as he may get from some other office, because he pays his premiums and takes receipts at the place where he is told to do so. It has been suggested that the *Albert*, to whom, during the latter part of the time, he paid his premiums, was never authorized by the *Manchester* to be its agent for the receipt of the premiums. The *Manchester* handed over the whole management of the business to the *Western*. The *Western* in its turn handed over the management of the business to the *Albert*, and I think that the *Manchester* must be answerable for that. They were the persons who gave the *Western* the power of so dealing with it, and it would be too much to say that their creditors can be affected, because the persons with whom they dealt handed over some part of their duty to somebody else.

Independently, therefore, of the case before Vice-Chancellor *Malins*, *In re National Provincial Life Assurance Society* (1), it is quite clear that this case is governed entirely by the authority of *In re Family Endowment Society* (2). In the case before Vice-Chancellor *Malins* I observe that it was not an actual decision. Reasons were given by the Vice-Chancellor, but he abstained even from dismissing the Petition. He made no order but actually gave the

(1) Law Rep. 9 Eq. 306. (2) Law Rep. 5 Ch. 118.

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Petitioner his costs out of the estate, and reserved the ultimate decision of the matter. I am of opinion, therefore, that I am not bound by that case to abstain from giving effect to my own opinion, which is that this is clearly within the principle of *In re Family Endowment Society* (1), that there has been no novation, and that the creditor's right against the *Manchester Association* remains perfectly intact. [His Honour added that very little costs would be incurred by making the order as the liquidator would be the liquidator of the *Albert* and of the *Western*, and when these claims were established, the *Western* would pay them under its covenant, except so far as the *Western* had got rid of them.]

No order and no costs upon *Pike's* Petition.

Usual order upon *Thompson's* Petition.

Solicitors: Messrs. *Underwood & Colman;* Messrs. *Drew & Wilkinson;* Messrs. *Lewis, Munns & Co.*

V.-C. J. 1870 *March* 14.

In re YORKSHIRE FIBRE COMPANY.

Company—Inspection of Accounts—Voluntary Liquidation.

A clause in the articles of association of a company, directing that the books of account (thereby directed to be kept) should, subject to any reasonable restrictions as to the time and manner of inspecting the same that might be imposed by the company in general meeting, be open to the inspection of the shareholders during the hours of business, is no longer applicable when the company is under voluntary liquidation.

THIS was a petition by a holder of fifteen fully paid-up shares of £50 each, praying that the *Yorkshire Fibre Company*, already in voluntary liquidation, might be wound up by the Court, or that the voluntary winding-up might be continued under the supervision of the Court.

The company was incorporated in October, 1862, and it was provided by sect. 15 of the articles of association:—The directors shall cause true accounts to be kept of the stock-in-trade of the company; of the sums of money received and expended by the company, and the matter in respect of which such expenditure

(1) Law Rep. 5 Ch. 118.

takes place; and, of the credits and liabilities of the company. Such accounts shall be kept upon the principle of double entry in a cash-book, journal, and ledger. The books of account shall be kept at the principal office of the company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection of the shareholders during the hours of business.

It was also provided that once at least in every year the directors should lay before the company in general meeting a statement of the income and expenditure for the past year, and also that a balance sheet containing a summary of the property and liabilities of the company should be made out in every year and laid before the general meeting of the company.

At an extraordinary general meeting of the company, held on the 15th of October, 1868, resolutions were passed:—

1. That it appearing that the company cannot by reason of its liabilities continue its business, the same be wound up voluntarily.

2. That the directors be appointed liquidators of the company, and that their powers be exercised by any three of them.

3. That the powers of the board of directors be continued so far as may be necessary for continuing the business until the disposal thereof, and that they be authorized to offer the concern for sale as it now stands for £13,000, such sale not to include the fibre in a raw or manufactured state, or in process of manufacture.

These resolutions were confirmed at an extraordinary general meeting held on the 11th of November, 1868.

The property was put up for sale by the liquidators in June, 1869, but not sold. It was again put up for sale in September, 1869, when, as the Petitioner believed, it was sold, and the purchaser had been let into possession. The Petitioner stated that he was unable to ascertain the amount of the purchase-money, or how it had been applied, though he had made applications to the liquidators and Mr. *Harwood*, their solicitor, for the purpose.

The last balance sheet of the company issued to the shareholders was for the year ending the 31st of December, 1867, before the commencement of the winding-up.

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No general meeting had been summoned by the liquidators since the commencement of the winding-up.

The Petitioner had made frequent applications to the liquidators by letter for information as to the accounts of the company, and the progress of the liquidation, and particularly for a balance sheet for the year 1868. A long correspondence took place, but the Petitioner was unable to obtain any copy of or access to the accounts of the company subsequent to 1867, or any information in reference to the progress of the liquidation.

In a letter to the Petitioner on the 19th of January, 1870, Mr. *Harwood*, the solicitor of the liquidators wrote:—

"In reference to your statement, that I will not give you any information, I beg to say that it does not appear to me that the liquidators are justified in putting the estate to expense by answering every inquiry that any shareholder may make. In your case numerous inquiries have been answered, but by reason of your requesting copies of documents to be made, and then declining to pay for them, unnecessary expense has been incurred. There appears to be no doubt but that the assets of the company will be insufficient to meet the liabilities, and this is the more reason to avoid expense."

Under these circumstances the Petition had been presented.

The question discussed was as to the right of the liquidators to refuse an inspection of the accounts to the Petitioner.

Mr. *Amphlett*, Q.C., and Mr. *Bagshawe*, for the Petitioner, referred to sect. 15 of the articles of association, and submitted that the shareholders were entitled to inspect the accounts at all reasonable times, and that the refusal of the liquidators was sufficient to induce the Court to direct a compulsory winding-up, or at least to continue the voluntary winding-up under supervision.

[They referred to *Lindley* on Partnership (1).]

Upon an undertaking by Mr. *Eddis*, Q.C., and Mr. *E. C. Willis*, for the liquidators, to call a meeting and to lay the accounts before it within fourteen days,

(1) Vol. i. 793.

Sir W. M. James, V.C., refused to make any further order as to costs or otherwise upon the Petition, being of opinion that the clause in the articles of association giving the shareholders the right to inspect the accounts did not apply after the company had been placed under liquidation.

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Solicitors: Mr. *Norvall;* Mr. *J. Harwood.*

In re LONDON AND PROVINCIAL TELEGRAPH COMPANY.

V.-C. J. 1870 *March* 17.

Companies Act, 1862—*Rectification of Register—Bankruptcy Adjudication—Advertisement in Gazette—Notice.*

At the time of *A.'s* bankruptcy, in September, 1864, fifty shares in a limited company were standing in his name. The certificates were taken in possession by *B.*, the trade assignee, but no steps were taken by him in respect of the shares, nor was any notice of the bankruptcy (which was at the time duly advertised in the *Gazette*) given to the company until July, 1869. In the mean time the shares were transferred by the company into the name of *C.*, the bankrupt's widow and executrix, and upon a statutory declaration that the original certificates had been lost or mislaid, duplicate certificates were delivered to *C.* in April, 1869, pursuant to the articles of association:—

Held, that the title of *D.*, a registered purchaser of the shares for value from *C.*, prevailed against the assignee in bankruptcy, who had taken no step for five years to assert his right. Application by the assignee for a rectification of the register under sect. 35 of the *Companies Act*, 1862, by the insertion of his name instead of that of *D.*, refused with costs.

Motion on behalf of *Charles Butler*, the assignee in bankruptcy of the late *Albert Samuel Saalfeld*, bankrupt, that the register of members of the *London and Provincial Telegraph Company* might be rectified by registering the name of *Charles Butler* as such assignee as aforesaid as the registered holder of fifty shares in the company lately registered in the name of *A. S. Saalfeld*, and numbered respectively 5381—5430 both inclusive, in lieu of the names of *Henrietta Saalfeld* as to five shares, *C. H. Feiling* as to twenty of the shares, and *Edward Fenner* for the remaining twenty-five of the shares.

A. S. Saalfeld, who was the registered proprietor of fifty shares

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in the company, was, on the 22nd of September, 1864, adjudicated bankrupt. On the 28th of October, 1864, the adjudication was advertised in the *London Gazette* and in the *Leeds Mercury*. On the 14th of November, 1864, *Butler* was appointed trade assignee under the bankruptcy, and the certificates of the shares had ever since remained in his possession. In May, 1866, the bankrupt died in *America*. In July, 1867, the fifty shares were transferred from the name of the bankrupt into that of his widow on proof of her husband's death, and of her having been his executrix; and in April, 1869, Mrs. *Saalfeld* applied to the company for renewed certificates in respect of her husband's fifty shares, stating that the original certificates of the shares had been mislaid or lost.

Upon a statutory declaration to this effect, duplicate certificates of the shares were delivered to Mrs. *Saalfeld* under clause 8 of the articles of association (1).

In June, 1869, forty-five of these shares were transferred by Mrs. *Saalfeld* to Mr. *Austin*. On the 30th of July, 1869, *Feiling* purchased twenty of the shares which had been transferred to *Austin*, and on the 3rd of December the remaining twenty-five were purchased by *Fenner*.

In July, 1869, the shares having risen in value, an application was made to the company on behalf of the assignee to have the fifty shares registered in his name with a view to a sale.

The company replied that they had then for the first time received any intimation of *Saalfeld's* bankruptcy; that the shares had been transferred into the name of Mrs. *Saalfeld* on proof of her husband's death, and of her having been left executrix; and

(1) The material clauses of the articles of association were:—

5. "Every person who has accepted, or may hereafter accept any share in the company, and whose name is entered in the register, and no other person, shall, for the purposes of these articles, be deemed to be a shareholder, and no notice of any trust expressed or implied or constructive, shall be entered in the register, or be receivable by the company."

7. "Every shareholder shall be entitled to receive gratis on demand a certificate or certificates under the common seal of the company, and in such form as the directors shall prescribe, specifying the share or shares held by him, and certifying his proprietorship thereof."

8. "If any such certificate be worn out or lost, it may, on production of the damaged certificate, or on satisfactory proof of the loss, be renewed on payment of such sum not exceeding one shilling, as the directors may prescribe."

that she had not at any time mentioned to them her husband's bankruptcy.

Under these circumstances Mr. *Butler*, as trade assignee of the deceased bankrupt, moved for a rectification of the register under sect. 35 of the *Companies Act*, 1862, by the insertion of his name in respect of the fifty shares and the removal of those of *Feiling*, *Fenner*, and Mrs. *Saalfeld*.

It appeared that on the 27th of December, 1869, a resolution was passed by the creditors, pursuant to sect. 110 of the *Bankruptcy Act*, 1861, that no further proceedings be taken in the said bankruptcy, and that a Mr. *Gordon* be appointed manager to wind up the bankrupt's estate.

Mrs. *Saalfeld*, whose address upon the register was *Hamburg*, was now in the *United States*.

Mr. *Amphlett*, Q.C., and Mr. *Bagshawe*, in support of the motion.

Mr. *Higgins*, for *Feiling* and *Fenner*, took the preliminary objection that sect. 35 did not apply to a case such as this, which could not be satisfactorily dealt with on motion from the complication of interest, the jurisdiction given by the section being confined to cases where the register was incorrect through default on the part of the company: *Ward and Henry's Case* (1); *Musgrave and Hart's Case* (2). He should also contend that in any case the assignee was barred by laches.

After some discussion, the objection of want of jurisdiction was waived, and the argument proceeded.

Mr. *Amphlett*, Q.C., and Mr. *Bagshawe*:—

There has been nothing to interfere with the title of the assignees to these shares. Upon the bankruptcy of *Saalfeld* and the appointment of assignees his shares and all other property vested absolutely in them, and no assignment made by the bankrupt, or by his personal representative after his death, even for value, can confer any title as against them: *In re Mary Coombe's Will* (3).

(1) Law Rep. 2 Ch. 431. (2) Law Rep. 5 Eq. 193.
(3) 1 Giff. 91.

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The decision in *Re Barr's Trust* (1), where it was held that an assignee for value, without notice of the bankruptcy, was entitled in priority to the assignees under the bankruptcy, proceeded on the old law before 12 & 13 Vict. c. 106, s. 141. We also submit that the advertisement of the adjudication in the *London Gazette* is notice to all the world, and that the assignees were not bound to give notice of the bankruptcy to the company in order to confirm their title to the shares. The assignees, no doubt, might have disclaimed the shares; but if nothing has been done by them they cannot be assumed to have disclaimed. They have a strict legal right to the shares, which is not affected by any laches on their part; and clause 5 of the articles of association would not have been any answer to an application by the assignees for a *mandamus*.

The Vice-Chancellor:—There must have been some one who remained the legal holder of these shares. The assignees had a legal right to have a conveyance of the shares, which is a mere equitable interest in the subject matter.

It was a right *in rem* which a Court of law would recognize and give effect to. If any dividends had been declared after the bankruptcy the company would not have been entitled to pay them to the bankrupt. But here no dividends were declared, nor were any calls made upon the shares, and therefore it was not necessary for the assignees who retained the certificates to take any steps.

[The following sections of the Bankruptcy Act, 1849, were referred to: sects. 104, 128, 141, 272.]

Mr. *Higgins* referred to *Hastie's Case* (2), *Martin's Patent Anchor Company* v. *Morton* (3), but was not called upon to argue the case.

Mr. *Lindley* appeared for the company.

Sir W. M. James, V.C.:—

By the regulations of the *Companies Act*, 1862, shares in a company shall be personal estate capable of being transferred in manner provided by the regulations of the company. In accord-

(1) 4 K. & J. 219. (2) Law Rep. 4 Ch. 274.
(3) Law Rep. 3 Q. B. 306.

ance with the regulations of the company, shares were standing in the name of a person who became bankrupt and afterwards died, his name being still on the list of shareholders, but in due accordance with the regulations of the company his executrix was recognized as a person capable of transferring. She did transfer the shares by an instrument, which the statute makes of the same validity as if she had been a shareholder at the time of the execution of the instrument of transfer, and under that transfer persons have paid their money and been registered as the present holders of these shares. I am of opinion that I cannot, at the instance of the assignees, who waited for five years before they interfered, deprive the present registered holders of that to which, as it appears to me, they have obtained a legal title. It is true that the bankruptcy laws vested in the assignees of the bankrupt any property belonging to the bankrupt, but that must mean the beneficial interest which he had; it did not interfere with the contract between the shareholder and the company. The company, if they had notice of the bankruptcy, may have made themselves liable to the assignees of the bankrupt, to some claim or action for compensation, if, by the transfer which was made, other persons acquired a legal title so as to derogate from the title of the assignees. They may possibly, by some mode or other, have made themselves liable to a claim for damages by those assignees; but, as the thing stands before me, I cannot arrive at the conclusion that there is any person whose name ought to be added to or removed from the register in respect of these shares.

The motion must, therefore, be refused with costs.

After some discussion, and subject to an affidavit verifying her being out of the jurisdiction, an order was made for the transfer to the assignees of the five shares remaining in Mrs. *Saalfeld's* name.

Solicitors: Messrs. *Few & Co.*; Mr. *Henry Harris*; Messrs. *Johnston, Farquhar, & Leech*.

V.-C. J.
1870
March 14.

In re CALNE RAILWAY COMPANY.

Judgments Law Amendment Act (27 & 28 *Vict. c.* 112)—*Judgment Creditor—Railway Company—Surplus Land—Sale.*

Upon the Petition of a judgment creditor of a railway company, an order was made, without directing inquiries, for a sale of surplus land of the company, not required for the undertaking and not used for building purposes, which had been delivered in execution to the Petitioner under a writ of *elegit*, the registry of which was still in force. The company were ordered to execute a proper conveyance.

In this case the Petitioners had, on the 23rd of July, 1867, entered up judgment against the *Calne Railway Company* in an action to recover the balance of a bill of costs due to them as former solicitors of the company, and they now petitioned under 27 & 28 Vict. c. 112 for a sale of certain small strips of land which had been actually delivered in execution to the Petitioners by the sheriff of *Wiltshire* in November, 1867, under a writ of *elegit*, the registry of which on the 23rd of November, 1867, was still in force.

It was proved by affidavit on the part of the Petitioners, that the land in question was surplus land, not required by the company for the purposes of their undertaking, and not situate within a town, or built upon, or used for building purposes, and that Lord *Crewe*, who had a right of pre-emption in respect of his adjoining estate under the provisions of the *Lands Clauses Act*, 1845 (s. 128), had agreed to purchase the land for a sum, which was proved by the affidavit of a surveyor to be the full value thereof, and was less than the amount due to the Petitioners under their judgment.

No evidence was filed on behalf of the company.

Mr. *Cozens-Hardy*, for the Petitioners, asked that the land might be sold to Lord *Crewe* for the agreed sum, and that the company might be ordered to join in and execute a proper conveyance, and that the Petitioners might be authorized to receive the purchase-money. He urged that it was not a case in which it was "neces-

sary or proper" (27 & 28 Vict. c. 112, s. 4) to direct the inquiries which were directed in *Ex parte Grissell* (1).

Mr. *Martineau*, for the company, contended that the Court could not order a sale without making the inquiries directed in *Grissell's Case;* that there was no sufficient proof that the land was surplus land; that the company would be entitled at any time within ten years to use the land for their undertaking, or to sell it on their own terms; and that the company could not be ordered to join in the conveyance: *In re Hull and Hornsea Railway Company* (2).

Mr. *Cozens-Hardy*, in reply:—

If it be held that an order for sale under the Act does not enable the judgment creditor to require the judgment debtor to concur in the conveyance for the purpose of covenanting for production, no sale can in many instances be effected.

SIR W. M. JAMES, V.C., held that this was a case in which the Petitioners were entitled to a sale without further inquiry. The company had not brought forward any evidence to shew that these strips of land were not surplus lands. The Act gave the Petitioners a right to a sale of the company's interest in the land, and Lord *Crewe* having the right of pre-emption, the Petitioners were entitled to sell to him at the price which was proved to be fair. Under 1 & 2 Vict. c. 110, s. 13, a judgment creditor had the same remedies as if the judgment debtor had by writing agreed to charge the land with the amount of the judgment debt. The subsequent Act (27 & 28 Vict. c. 112) did not appear to have taken away any of the rights of a judgment creditor. He therefore thought the Petitioners were entitled to an order directing the company to execute a proper conveyance. The Petitioners must add their costs to their debt.

Solicitor for the Petitioners: Mr. *J. H. Johnson.*
Solicitors for the Company: Messrs. *Ward, Mills, & Witham.*

(1) Law Rep. 2 Ch. 385. (2) Law Rep. 2 Eq. 262.

For order see 2 Johns & Hem. 1861. Reg Lib 1870 A. 586

V.-C. J.
1870
Feb. 8.

In re BATEMAN.

Prohibition—Consistory Court—Jurisdiction—Pews—Prescription—Form of Order.

A prohibition will issue out of Chancery in vacation time, upon an *ex parte* application to restrain a spiritual court from trying a claim by prescription to pews in a parish church.

THIS was an *ex parte* application for a writ of prohibition to restrain the Judge of the Consistory Court of *Llandaff* from proceeding to try the prescriptive right of *John Bateman*, a lunatic, to four pews in the parish church of *Llantrissent*, claimed by him as appurtenant to his mansion and farm in the said parish.

John Bateman, who was found by inquisition in 1854 to be of unsound mind, was entitled, as tenant in tail in possession, to a freehold estate in the parish of *Llantrissent*, comprising the mansion house of *Bertholey*, and, as appurtenant to such mansion house and a messuage called *Whitehall Farm*, claimed to be entitled by prescription to four pews in the parish church.

In January, 1868, the churchwardens of *Llantrissent* presented a petition to the Chancellor of the *Llandaff* Consistorial Court, praying a faculty for reflooring and reseating the church according to a plan which involved the removal of the four pews claimed by *John Bateman*. *Robert Bateman*, the brother and committee of *John Bateman*, under the sanction of the Master in Lunacy, appeared upon the citation issued by the Chancellor of *Llandaff*, and filed an act in objection to the granting of the faculty, stating the prescriptive title of *John Bateman* to the pews as appurtenant to the mansion house and farm.

The churchwardens filed their answer to the act in objection, and thereby denied that the pews had been from time immemorial annexed to the mansion house and farm.

Replication was filed to this answer, and rejoinder was filed to the replication. The pleadings being thereby completed, and the cause being at issue, evidence had been put in on either side, and the Chancellor had directed the case to be argued at the Consistory

Court to be held on the 10th of February, and, as it was alleged in the affidavit, intended to proceed forthwith to try the question of the prescriptive right of *John Bateman* to the pews.

On the ground that the Consistory Court had no jurisdiction to try the question, and, in reference to the application being made in Chancery, that a writ of prohibition could only be obtained at Common Law during term time, and that Hilary Term had expired before the committee was in a position to move, the present application was made on behalf of *Robert Bateman*, the committee in lunacy of *John Bateman*.

The application was supported by an affidavit of the solicitor, deposing to the facts.

Mr. *Cracknall*, in support of the application, referred to *Comyn's* Dig. tit. Prohibition (1):—

"If one has prescription to have a seat in a church, and the seats are pulled down without his consent and new ones built by the ordinary on part of the place where the old one was, though he have as much seat as he had before, only not in the same place, it is illegal, and if spiritual court interpose prohibition lies:" *Archer* v. *Sweetman* (2); and this is because it is not competent for the Ecclesiastical Courts to determine upon matters of freehold and rights of inheritance, or, by consequence, to try a claim by prescription: *Knapp* v. *Parishioners of Willesden* (3); *Comyn's* Dig. tit. Prohibition (4); *Byerley* v. *Windus* (5). The application is made to this Court, as there is concurrent jurisdiction in Chancery, even in term time, to award a prohibition: *Ex parte Lynch* (6); and the Courts of Common Law cannot issue the writ during vacation: *In re Foster* (7). In this case the proper formalities have been complied with. The party applying has already pleaded in the Consistory Court, and in such case the prohibition issues, of course, upon a proper affidavit: *Walker* v. *Fanderheide* (8); *In re Magor* (9); *Oliphant* on Pews (10).

(1) F. 2.
(2) Fort. 346.
(3) 2 Rob. Ecc. 358.
(4) B., G. 3.
(5) 5 B. & C. 1, 21, 22.
(6) 1 Madd. 15.
(7) 24 Beav. 428.
(8) 1 Dick. 336.
(9) T. & R. 314.
(10) Page 165.

V.-C. J. 1870 *In re* BATEMAN.

If the writ is issued irregularly, it will be open to the other side to move to supersede it: *In re Magor* (1); *Seton* on Decrees (2).

SIR W. M. JAMES, V.C., said that it would have seemed more proper in such a case as this to grant, in the first instance, a prohibition in the form of an order *nisi*. The practice, however, appears to have been to grant an order absolute at once, leaving it to the parties affected to move to dissolve it, and he should therefore follow the practice, and make an order absolute for a prohibition to issue to the Judge of the *Llandaff* Consistory Court to restrain him from proceeding to try the issues raised in the cause as to the prescription claimed by the applicant to the pews, or so as to interfere with the rights of the applicant.

Upon motion this day made unto this Court, by counsel, for the above-named *Robert Bateman*, who alleged that pleas or actions, in which the title to any corporeal or incorporeal hereditaments is in question, cannot be impleaded, or brought, or adjudicated upon in the above mentioned Consistorial Court, and that the above-named churchwardens have impleaded or cited the minister, parishioners of the said parish of *Llantrissent*, and all others, having or pretending to have any right, title, or interest in the premises, to shew cause why a license or faculty should not be granted to the said churchwardens for the purpose of new flooring and reseating the church of *Llantrissent*, &c., in the said Episcopal and Consistorial Court of *Llandaff*, wherein the title to certain hereditaments is in question, viz., the title to certain pews and seats in *Llantrissent* church, claimed to be part of and appurtenant to a certain freehold mansion house, and a certain freehold farm house and hereditaments, of or to which *John Bateman* is or claims to be seised or entitled; and upon reading an affidavit in support of the said allegation, &c., this Court doth order that the Chancellor of the diocese of *Llandaff*, and the said churchwardens, be prohibited from further proceeding in the said pleas or actions in the said Consistorial Court of the diocese of *Llandaff*, and that a writ of prohibition issue accordingly.

Solicitor: *Henry White.*

(1) T. & R. 314. (2) Page 951.

WALKER *v.* WALKER.

V.-C. J.
1879
Feb. 18.

Practice—Revivor and Supplement—Infant born since Suit—Omission by inadvertence to make the Infant a Party—Supplemental Order nunc pro tunc— 15 & 16 *Vict. c.* 86, *s.* 52.

After decree in an administration suit, an infant was born, who shortly after his birth became interested in possession, and was a necessary party, but was, by inadvertence, overlooked. Sales were made and approved, and upon the investigation of one of the titles, the omission was discovered:—

Held, that it was not a case for revivor; and a supplemental order made, that the proceedings should be of the same force and effect as if the infant had been made a party immediately after his birth.

THIS was a suit for the administration of the trusts of the will of *Nicholas Walker*, who, by his will, dated the 1st of August, 1856, gave and devised all his real and personal estate to his brother *John Walker*, and his nephew *Wainman Holmes*, the younger, upon certain trusts for the benefit of his wife, during widowhood, and at the death or second marriage of his wife, he gave and bequeathed one moiety thereof in equal shares unto all the children of his brother *John Walker*, and the other moiety in equal shares unto all the children of his sister *Ann Holmes;* and appointed *J. Walker* and *W. Holmes* his executors.

The testator died on the 2nd of August, 1856.

The bill was filed on the 5th of February, 1859, by two of the (three) children of *Ann Holmes*, living at the testator's death, who were females, and their husbands, four infant children of *John Walker*, who were living at that date, and one born since, against *John Walker*, *Wainman Holmes*, the younger (who was the third child of *Ann Holmes*), *Elizabeth Walker* (the testator's widow), and *Wainman Holmes*, the elder, and *Ann* his wife.

All the Defendants appeared; no answer was required or put in; on the 19th of February, 1859, a decree was made, directing accounts and inquiries; and on the 8th of August, 1859, the Chief Clerk made a certificate.

On the 27th of August, 1859, another infant child of *John Walker*, named *John Walker* (the younger), was born; but the fact was overlooked in the subsequent proceedings.

V.-C. J. 1870 WALKER v. WALKER.

On the 12th of March, 1860, on further consideration, the real estate was directed to be sold; and the accounts were ordered to be continued.

After that date, *Elizabeth Walker*, the widow, died.

In 1863, part of the estates was sold by private contract, and the sale was confirmed on the 11th of February, 1863. The sale of another portion was confirmed on the 13th of December, 1869; and upon investigation of the title to this portion, the fact of the birth of the above child having been overlooked was discovered.

Mr. *Wickens*, for the Plaintiffs, now moved for a supplemental order, making the infant *John Walker* the younger, a party *nunc pro tunc*. He referred to *Morgan's* Chancery Acts and Orders (1) and the cases there cited.

Mr. *Fry*, Q.C. (*amicus curiæ*), referred to *Griffin* v. *Morgan* (2).

Sir W. M. James, V.C., was of opinion that it was not a case for revivor; and made an order, of which the following is a minute.

[After reciting the circumstances, and that the suit was defective in manner aforesaid], the Court, being of opinion that the directions contained in the said order, dated the 12th day of March, 1860, and the sales made thereunder, were for the benefit of the infant *John Walker* the younger, doth order that the aforesaid order of the 12th day of March, 1860, and the inquiries and accounts thereby directed, and the proceedings thereunder be carried on and prosecuted as against the said *John Walker* the younger, and be of the same force and effect as if he had been a party to this suit immediately after his birth.

Solicitors: Messrs. *Paterson, Snow, & Burney.*

(1) 4th Ed. p. 213, note (2).

(2) Law Rep. 4 Ch. 351.

SCOTT *v.* DUNCOMBE.

V.-C. J.
1870
March 24.

Practice—Supplemental Bill—Infants—15 & 16 *Vict. c.* 86, *s.* 52.

Proceedings having been taken in a suit after it had become defective by the birth of children of the class entitled:—

Held, overruling *Grunwell* v. *Garner* (1), that the children could not be brought before the Court by supplemental order.

THIS was an administration suit, and two infants who were entitled in remainder to the property, the subject matter of the suit, had been made parties. A decree had been made directing the usual accounts and inquiries.

Two more members of the class interested had been subsequently born, and since the proceedings became defective by their birth two orders were made in the suit.

A supplemental order to bring these infants before the Court and bind them by the proceedings, was obtained on the 10th of March, on the authority of *Grunwell* v. *Garner* (1) and *Walker* v. *Walker* (2).

A difficulty having been raised in the registrars' office from the cases of *Auster* v. *Haines* (3) (where proceedings having been taken in the suit after it became defective by the birth of children, the Lord Chancellor held that there was no jurisdiction to make a supplemental order under 15 & 16 Vict. c. 86, s. 52, bringing before the Court the newly-born infants, and directing that they should be bound by the proceedings,) and *Capps* v. *Capps* (4), the case was again mentioned.

Mr. *Renshaw* mentioned the case to the Court and referred to the above cases.

SIR W. M. JAMES, V.C., said that he was bound by the case of *Auster* v. *Haines*, which had not been brought to his attention in *Grunwell* v. *Garner*, and stopped the supplemental order.

Solicitor: Mr. *W. Day.*

(1) Law Rep. 8 Eq. 355.
(2) *Ante*, p. 663.
(3) Law Rep. 4 Ch. 445.
(4) Ibid. 4 Ch. 1.

V.-C. J.
1870
March 14.

PADDON *v.* WINCH.

Practice—Production of Documents.

Upon the purchase by *A.* from mortgagees selling under their power of sale, letters passed between the solicitors of *A.* and of the mortgagees, in which reference was made to an anticipated claim by *B.* to a legacy as charged upon the mortgaged property.

B. subsequently filed a bill to establish a charge in respect of her legacy upon the property in the hands of *A.*:—

Held, that the correspondence between the solicitors of *A.* and of the mortgagees before the institution of the suit was not privileged from production.

ADJOURNED summons for production by the Defendant of certain letters in his possession, written before the institution of the suit.

The bill was filed in October, 1869, by a legatee whose testator died in 1848, for the purpose of obtaining a declaration that her legacy was charged upon certain freehold hereditaments, which had been sold to the Defendant *Winch* by the *West of England and South Wales District Bank* in January, 1868, as mortgagees with power of sale, from the testator's son, to whom the property was devised (charged, as the bill alleged, with payment of legacies and interest).

The Defendant by his answer insisted that he was purchaser of the property for valuable consideration without notice; that he was led to believe that the Plaintiff's legacy had been long since paid, though out of abundant caution the bank had given him an indemnity against any claim in respect of such legacy.

A summons having been taken out for production of documents by the Defendant, the Defendant claimed privilege (amongst other documents) for certain letters which had passed between the solicitors and agents for the bank and his solicitors, between August, 1867, and February, 1868, during the negotiations for his purchase.

The Defendant's affidavit stated that these letters were "letters referring to the Plaintiff's claim for her legacy, which is the subject matter of dispute in this suit; my solicitor, Mr. *Downing*, having as my solicitor corresponded with Messrs. *Chanter & Finch*

and other the agents of the said bank concerning the same. Such letters were written in anticipation of proceedings being taken in reference to the said legacy."

Mr. *Graham Hastings*, for the Plaintiff, in support of the summons, contended that the privilege was not extended to communications between the Defendant's solicitor and third parties before the suit arose and not for the purposes of the suit: *Ford* v. *Tennant* (1).

Mr. *Ince*, for the Defendant, contended that the letters in question were privileged communications, having been written in anticipation of the claim raised by the Plaintiff which was then contemplated though it had not actually ripened into a suit; and that the Plaintiff was not entitled to see, as was attempted by this application, the evidence of the Defendant before the hearing.

The protection is now extended to communications *ante litem motam;* to correspondence between a client and his solicitor acting in a professional capacity, even though it does not relate to the subject matter of the suit; and to letters between the solicitor and a third party referring to the subject matter in dispute in anticipation of the suit and before proceedings have been taken: *Simpson* v. *Brown* (2); *Curling* v. *Perring* (3); *Pearse* v. *Pearse* (4); *Manser* v. *Dix* (5).

Mr. *Hastings*, in reply, referred to *Gore* v. *Bowser* (6).

SIR W. M. JAMES, V.C.:—

I am of opinion that these documents must be produced. It is quite clear, looking at the dates, that they were not written with a view to the defence of this suit. They were letters that passed between the solicitor of the purchaser and the solicitor of the vendor in reference to a contract for the purchase by the Defendant, in which the legacy claimed by the Plaintiff was incidentally

(1) 32 Beav. 162. 9 Jur. N.S. 292
(2) 33 Ibid. 482.
(3) 2 My. & K. 380.
(4) 1 De G. & Sm. 12.
(5) 1 K. & J. 451. 1 Jur. N.S. 466
(6) 5 De G. & Sm. 30.

V.-C. J. 1870 PADDON v. WINCH.

mentioned. They cannot be said to be letters written in anticipation of the claim raised by this suit, and must therefore be produced.

Solicitors: Mr. *G. Dillon Webb*; Mr. *W. A. Downing*.

V.-C. J. 1870 *Feb.* 28.

In re JOLLIFFE'S ESTATE.

Lands Clauses Act (8 *Vict. c.* 18), *ss.* 70, 80—*Practice—Costs—Order for payment of Dividends to Tenant for Life—Subsequent Order for payment of Dividends to Tenant in Tail—Petition.*

An order had been obtained on Petition for payment to a tenant for life of dividends of a sum of stock representing purchase-money paid into Court under the *Lands Clauses Act* by a company which had taken land in settlement. The tenant for life died, and the guardian of an infant tenant in tail entered into receipt of the rents and profits. At the death of the tenant for life two dividends and a proportionate part of a third had not been received by him:—

Held, that the order for the payment to the executors of the tenant for life of the dividends and apportioned part of the dividend might have been obtained by summons; but that the order for the payment of the other apportioned part of the dividend, and for future payment of dividends to the guardian of the infant tenant in tail, could properly be made only on Petition, of which the company must pay the costs.

PETITION.

By the will of *Hylton Jolliffe*, who died on the 26th of September, 1842, lands were devised to the use of trustees and their heirs in trust for *Charles Jolliffe* for life, without impeachment of waste, remainder in trust for his first and other sons in tail male.

The estates were subject to a mortgage.

In 1857 part of the lands was taken by the *Carlisle and Silloth Bay Railway and Dock Company*, with whose Act the *Lands Clauses Consolidation Act*, 1845, was incorporated: the purchase-money, £4256 8*s.* 6*d.*, was paid into Court, invested in the purchase of £4516 2*s.* Consols, and placed to the account of "*Ex parte* the Company, *In re* the *Railway and Dock Act*, 1854, The Account of *Charles Jolliffe*;" and, by a subsequent order in the same year, was transferred to another account of "*Ex parte* the Same, *In re* the Same, The Account of *Charles Jolliffe*, The Trustees of the Will,

and The Mortgagees," subject to further order; and it was further ordered that the dividends should be paid to *Charles Jolliffe* during his life, or until further order.

Charles Jolliffe died on the 13th of October, 1869, having by his will and two codicils appointed his widow, *Mary Jolliffe*, sole guardian of his infant children, and appointed *William Thompson* and *John Lyon* his executors.

Upon *Charles Jolliffe's* death, *Mary Jolliffe*, his widow, as guardian of his eldest son, *Charles Hylton Jolliffe*, an infant, entered into possession of the rents and profits.

This Petition was presented in the matter of *Hylton Jolliffe's* estate, of the *Railway and Dock Act*, and of the *Lands Clauses Act*, by *Charles H. Jolliffe*, the infant, by his mother and next friend, by *Mary Jolliffe* as testamentary guardian, by *Thompson* and *Lyon* as executors of *Charles Jolliffe's* will, and by the surviving trustee of *Hylton Jolliffe's* will, stating that there were now standing in Court, besides the above sum of stock, three dividends unpaid thereon, being the dividends which accrued due in January and July, 1869, and in January, 1870; that the two former dividends, and an apportioned part of the third, were payable to *Charles Jolliffe's* executors, and the rest of the third dividend to the guardian; and praying for payment of the two dividends and the apportioned part of the third to the executors, and that the other apportioned part, and all future dividends, might be paid to the guardian during the infancy of the infant tenant in tail, or until further order; and for payment of costs by the railway company according to the Act.

Mr. *Bedwell*, for the Petitioners.

Mr. *Deere Salmon*, for the company:—

This order might have been made on summons.

As to the first two unpaid dividends, there can be no question. The former order would apply to them.

As to the apportioned part of the third dividend which belongs to the executors, the question is also set at rest by Cons. Ord. XXIII. r. 8, which says that "the same order is to provide for" the payment of the apportioned part.

V.-C. J. 1870 *In re* Jolliffe's Estate.

As to the rest:

Under the old practice, whenever an order had been made on Petition, subsequent orders might be obtained on motion: *Ex parte a Friendly Society* (1); *In re Slewringe's Charity* (2).

In this instance the question turns upon the 70th and 80th sections of the *Lands Clauses Act* (8 Vict. c. 18), the former of which says that orders for payment of dividends "may," not "must," be made on Petition. This relates only to a first order, and when an order for payment of dividends has been once made on Petition, subsequent orders for the same purpose may be obtained by summons: *Ex parte Incumbent of Guilden Sutton* (3); referring to *In re Hodges* (4) and other cases.

The company has already paid the costs of a Petition.

Mr. *Nalder*, for the mortgagees.

Sir W. M. James, V.C.:—

It appears to me that this case is very plain.

The executors of a tenant for life asking for payment to them is the same thing as the tenant for life asking for payment to himself; and as to that part of the order, no doubt it might have been obtained on summons.

But as to the rest, there has been a transmission of interest, and a new order is necessary. That being so, the company must pay the additional costs that have been incurred.

The order was made as prayed; costs according to the Act.

Solicitors for the Petitioners: Messrs. *Currie & Williams.*
Solicitors for the Company: Messrs. *James, Curtis, & James.*
Solicitors for the Mortgagees: Messrs. *Coverdale & Co.*

(1) 10 Ves. 287.
(2) 3 Mer. 707.
(3) 8 D. M. & G. 380.
(4) 4 D. M. & G. 491.

CORBETT *v.* HILL.

V.-C. J. 1870 Feb. 16, 18.

Trespass—Contiguous Houses—Room of one House projecting over Site of the other—Right to Column of Air over Projection.

Plaintiff, the owner of two contiguous houses in the city of *London*, sold one to the Defendants by a conveyance which correctly marked out the ground site of the house conveyed. One of the first-floor rooms in the house retained by the Plaintiff projected over the site, and was supported by the other house :—

Held, that the vertical column of air over so much of the room as overhung the Defendants' site belonged, not to the Plaintiff, but to the Defendants.

MOTION for decree.

By a deed of conveyance, dated the 23rd of April, 1866, a messuage, warehouse, and hereditaments, situate and being No. 15, *Philpot Lane*, "as the same were then in the occupation of" certain tenants, and another messuage, warehouse, and hereditaments situate and being No. 34, *Eastcheap*, in the city of *London*, "as the same were then in the occupation of *Joseph Prime*," were conveyed to such uses as the Plaintiff, *Charles Joseph Corbett*, should appoint, and in default of appointment to the use of the Plaintiff for life, remainder to uses to bar dower, remainder to the use of the Plaintiff in fee.

By an indenture dated the 26th of June, 1866, the messuage, warehouse, and hereditaments at 34, *Eastcheap*, "as the same was then lately in the occupation of *Joseph Prime* and then of the said *Charles Joseph Corbett*," were conveyed by the Plaintiff and another to the Defendants, *Thomas Rawley Hill* and *Edward Bickerton Evans*, their heirs and assigns.

On each indenture there was a plan drawn in the margin.

Shortly after June, 1866, the Defendants began pulling down the house and premises, No. 34, *Eastcheap*, and the Plaintiff then discovered that one of the rooms on the first floor of his house, No. 15, *Philpot Lane*, projected into and was supported by the Defendants' house. He also discovered that a cellar or vault belonging to his house, No. 15, *Philpot Lane*, projected under the basement-floor of the Defendants' house; and that, on the other hand, a cellar or vault belonging to the Defendants' house, No. 34, *Eastcheap*, projected under the basement of the Plaintiff's house.

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Neither of these three projections appeared in the plans, which were of the ground-floor. The projecting cellar belonging to the Plaintiff's house was in part vertically under the projecting room belonging to the Plaintiff's house.

The Defendants, in rebuilding their premises, No. 34, *Eastcheap*, manifested an intention of building over the roof of the projecting room; in other words, of entering upon the vertical column of air above the projecting room; and they claimed the right to do this.

The Plaintiff, on the other hand, claimed the column of air above the projecting room *usque ad cœlum;* and, after a correspondence, filed the bill on the 3rd of October, 1868. On the same day the Master of the Rolls granted an *ex parte* injunction to restrain any further erection; but the Defendants nevertheless proceeded on the 3rd and up to 12 o'clock on Monday, the 6th of October, when a notice to commit was served. By this time the walls of the building over the projecting room were finished, but not roofed in.

On the 3rd of December, 1868, the Defendants moved before Lord Justice, then Vice-Chancellor, *Giffard*, to dissolve the injunction, when His Lordship dissolved the injunction, but reserved the costs to the hearing.

The bill was answered on the 12th of January, 1869, and amended on the 9th of February, and, as amended, prayed for a declaration that the projecting room was not comprised in the hereditaments conveyed to the Defendants by the deed of the 26th of June, 1866, and for an injunction to restrain the Defendants from erecting or building or placing any erection or structure over or on the roof of the projecting room, or any part thereof.

To the amended bill the Defendants, on the 22nd of March, put in a voluntary answer.

Mr. *Amphlett*, Q.C., and Mr. *Lindley*, for the Plaintiff:—

A demise of premises in *Westminster*, late in the occupation of *A.*, particularly describing them, part of which was a yard, was held not to pass a cellar situate under that yard, which was then in the occupation of *B.*, another tenant of the lessor: *Doe* v. *Burt* (1); *Press* v. *Parker* (2).

The whole of the air *usque ad cœlum* belongs to us, or at least is

(1) 1 T. R. 701. (2) 2 Bing. 456.

common to both of us. It is like the right to the air above a house in *Lincoln's Inn* containing sets of chambers which belong to different owners: *Martyr* v. *Lawrence* (1); *Kerslake v. White* (2).

The injunction is not prayed on the ground of any damage which they are doing us; we allege no damage; it is only on the ground of continuous trespass.

Mr. *Kay*, Q.C., and Mr. *Bovill*, for the Defendants, were not heard.

SIR W. M. JAMES, V.C.:—

In this case the Plaintiff seeks an injunction to prevent the continuance of a building which has been erected over a certain room belonging to the Plaintiff, which protrudes over the site of the Defendants' house, No. 34, *Eastcheap*.

The Plaintiff conveyed that house, No. 34, *Eastcheap*, to the Defendants. He conveyed it by a plan which carefully delineates the site of the house.

Now the ordinary rule of law is, that whoever has got the *solum*—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law, no doubt, is frequently rebutted, particularly with regard to property in towns, by the fact that other adjoining tenements, either from there having been once a joint ownership, or from other circumstances, protrude themselves over the site. The question then arises, whether the protrusion is a diminution of so much of the freehold, including the right upwards and downwards, as is defined horizontally by a section of the protrusion; or whether such a portion only is carved out of the freehold as is included between the ceiling of the room at the top and the floor at the bottom.

In my opinion the protruding room here affects only a diminution of the last-mentioned limited character. The diminution does not extend beyond the protrusion itself, which the Plaintiff has, of course, retained as part of his freehold in *Philpot Lane*. My opinion is that that room remains part of the *Philpot Lane* house; and that, although part of the house, it does not carry with it anything above

(1) 2 D. J. & S. 261. (2) 2 Stark. 508.

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it or anything below; but that, subject to the exception which has been obtained or made by reason of the protrusion, the owners of the house in *Eastcheap* still remain the owners of everything else, including the column of air above the room upon which the supposed trespass has been made.

That being so, it seems to me the Plaintiff's case has failed, and the bill must be dismissed with costs.

The order will be that, the Court being of opinion that the column of air over so much of the room in the bill mentioned as projected over the site of the ground floor of the house conveyed to the Defendants passed to the Defendants, the bill stand dismissed with costs, including the costs of the motion; but the order will be without prejudice to any question as to the ownership of the room.

Solicitors for the Plaintiff: Messrs. *C. T. Jenkinson & Son.*
Solicitor for the Defendants: Mr. *Worthington Evans.*

V.-C. J. 1870 *March 3.*

JONES *v.* BONE.

Grantor and Grantee—Covenant against the Use of the "Trade of a Seller by Retail of Wine or Spirits"—Sale by Grocer of Wine and Spirits in Bottle.

16 Ch D 646
19 Ch D 263
264

A grantee in fee of a piece of building land covenanted by a separate deed with the grantor that the piece of land should not for the space of twenty years be used "as a site for any hotel, tavern, public-house, or beerhouse," nor should "the trade or calling of an hotel or tavern keeper, publican or beer-shop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors," be "used, exercised, or carried on, at or upon" the same:—

Held, that the sale of wine and spirits in bottle by a grocer in the course of his trade was not such a breach of the above covenant as the Court of Chancery would interfere with.

Feilden v. *Slater* (1) distinguished.

MOTION for decree.

In 1854 certain pieces or parcels of land in the parish of *Tottenham, Middlesex*, were marked out on a map or plan drawn upon a deed of covenant dated the 17th of July, 1854, and made between

(1) Law Rep. 7 Eq. 523.

the several persons who had become purchasers in fee of the parcels of land respectively, of the one part, and three persons, vendors of the other part, whereby the parties of the first part jointly and severally covenanted with all and each of the parties thereto of the second part as follows:—

"None of the said pieces or parcels of land except the six pieces or parcels of land which are coloured red in the said map or plan shall for the term of twenty years from the date of these presents be used as a site or sites for any hotel, tavern, public-house, or beer-house, nor shall the trade or calling of an hotel or tavern keeper, publican, or beer-shop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors at any time during the said term be used, exercised, or carried on, at or upon any house or buildings "which may be erected on any of the said pieces or parcels of land, except the said pieces or parcels of land coloured red."

The Plaintiff, *William Jones*, was a purchaser of one of the pieces or parcels of land, numbered 431 and coloured red on the plan.

Another piece or parcel of the same land numbered 373, and not coloured red on the plan, situate at the corner of *Commerce* and *Southgate Roads*, *Wood Green*, *Tottenham*, was purchased by one *William Godwin*.

Both the Plaintiff and *Godwin* executed the above deed.

From and after June 1867, the premises standing on the plot of land numbered 373 were occupied as a tenant by the Defendant *William Bone*, who carried on there the trade of a grocer, to which he added the trade or business of selling wine and spirits (not beer) in bottles only, as the agent of Messrs. *W. & A. Gilbey*, a firm of *London* wine merchants.

The bill was filed on the 11th of November, 1869, for an injunction to restrain the Defendant from using the house, shop, or building erected on the piece or parcel of land numbered 373 in the terms of the covenant; and for damages.

An injunction was moved for, and ordered to stand to the hearing.

A considerable portion of the Defendant's evidence went to shew that the Plaintiff, who kept a tavern called the *Nightingale Tavern*, on the piece of land numbered 431, purchased by him, was carrying

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on his business of a publican, partly in a skittle-ground and garden, which were situated on parts of some or one of the pieces or parcels of land adjoining that numbered 431, and which were not coloured red on the plan; and that he was in fact himself breaking the covenant.

Plaintiff, by an affidavit in reply, said that his business was carried on at the bar of the public-house which was situated within and upon the piece of land numbered 431.

This evidence in the result became unimportant.

Mr. *Eddis*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiff, relied upon *Feilden* v. *Slater* (1), and referred to *Western* v. *MacDermott* (2).

Mr. *Amphlett*, Q.C., and Mr. *Bailey*, for the Defendant:—

But for your Honour's decision in *Feilden* v. *Slater*, we should have said that here there has been no breach at all. Our license only permits us to sell wine and spirits in quantities not less than a pint bottle; we do not sell by retail, we keep no bar; all we keep is a grocer's shop.

Mr. *Feilden* was a teetotaler, and in inserting the restriction he did in his conveyances had another and a different object in view than the mere restraint of the trade of an inn or public house keeper.

The VICE-CHANCELLOR said he did not think the object of the covenant was to secure a monopoly to the lessees of the pieces of land marked red on the plan; the object was to protect the neighbours. He could not suppose the object was to interfere with the ordinary business of a grocer selling wine and spirits in bottle.

Mr. *Amphlett*:—*Pease* v. *Coats* (3), in which it was held that a covenant not to use a building as a public-house did not prevent the covenantor from selling beer under a license to sell beer not to be drunk on the premises, was cited in *Feilden* v. *Slater*.

Prior to the *Wine Licenses and Refreshment Houses Act* (23 Vict.

(1) Law Rep. 7 Eq. 523. (2) Law Rep. 2 Ch. 72, 75.
(3) Law Rep. 2 Eq. 688.

c. 27) passed in 1860, no wine and spirit merchant could sell a less quantity of wine or spirits than two gallons, or one dozen bottles, except as a freeman of the *Vintners' Company*. The inhabitants of certain privileged places were also allowed to sell without license, these being, according to the author of *Bateman's* Excise Laws, the universities of *Oxford* and *Cambridge* and the borough of *St. Alban's*.

Now a £10 10*s.* license enables the licensee to sell in quantities down to a single quart bottle, and quantities less than two gallons, or one dozen reputed quarts may be sold with a £3 3*s.* license.

The argument was stopped by the Court.

Mr. *Eddis* in reply.

SIR W. M. JAMES, V.C.:—

I do not think this is a case in which this Court ought to interfere; but my refusal to interfere will not, of course, prejudice the Plaintiff's legal rights.

I should have thought it necessary to hear a great deal more than I have already heard about the alleged breach of the covenant by the Plaintiff himself before I granted an injunction; but this becomes unnecessary, because the Plaintiff has not shewn such a case as to satisfy me that a Court of Equity ought to interfere.

The decision in *Feilden* v. *Slater* (1) has been pressed upon me; but I observe that in that case the covenant was against the use of the house "for the sale of spirituous liquors;" here it is against using, exercising, or carrying on the business of "a seller" by retail of wine, beer, or spirituous liquors. Now at the time when this covenant was entered into there was a trade perfectly well known as the trade of an innkeeper or public-house keeper; and "the business of a seller by retail of wine, beer, or spirituous liquors," was, in the then state of the law, an expression which would naturally apply to the case of a gin palace bar, or the like, and which might not have been thought sufficiently covered by the words "business of a tavern-keeper, inn-keeper, or publican."

(1) Law Rep. 7 Eq. 523.

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That was a trade perfectly well known; and it was against that trade that this covenant was directed, and not against the trade of a wine merchant.

Since then, under the new excise laws, a perfectly new line of business has sprung up—this sale of wine and spirits in bottle by grocers, which is really only a modification of the old wine merchant's business.

I think this is not the sort of thing which was intended to be provided against; and, as the Plaintiff's case fails, his bill must be dismissed.

Mr. *Eddis* asked that it might be dismissed without costs.

The VICE-CHANCELLOR said he feared the costs must follow the result, and dismissed the bill with costs.

Solicitor for the Plaintiff: Mr. *William Compton Smith.*

Solicitors for the Defendant: Messrs. *Bailey, Shaw, Smith, & Bailey.*

V.-C. J. 1870 March 9.

CARTER *v.* WILLIAMS.

Grantor and Grantee—Separate Agreement by Grantee in Restriction of Trade—Breach of Covenant by Sub-Tenant from Year to Year—Remedy against Sub-Tenant.

A grantee in fee of a piece of building land entered into a separate agreement with the grantor, that during twelve years and a half no building on the premises should be used for "the sale of ale, beer, spirits, wine, porter, or as an inn, public-house, or beer-house." His assignee built a house on the land, and let it from year to year to a tenant, who opened it as a public-house. The assignee said he had no knowledge of the restriction; but this statement was disproved.

Upon bill for an injunction against the assignee and his tenant, who had no knowledge of the agreement:—

Held, that no relief could be had against the tenant, who, if he had asked his lessor, would have been told there was no restriction, and if he had seen the conveyance, would have found none: and bill, as against him, dismissed with costs.

THIS was a bill by *Thomas Carter* against *Thomas Benjamin Williams* and *Paul Price*, praying that the Defendants, their servants and agents, might be restrained from using or allowing

to be used, for the term of twelve years and a half from the 12th of February, 1866, a house erected by the Defendant *Williams*, "in any way for the sale of ale, beer, spirits, wine, porter, or as an inn, public-house, or beer-house."

The Plaintiff, who was the owner of a close of land abutting on *Chester Street*, in the city of *Chester*, erected on it a dwelling-house, which was afterwards licensed as an inn or public-house; and by a lease dated the 6th of April, 1864, he demised the same to Messrs. *Sellers*, a firm of brewers, for fourteen years from the 1st of May, 1864, upon an understanding that during the term no other house to be built on the close of land should be used as an inn or public-house.

In 1866 the Plaintiff sold to the Defendant *Williams* another portion of the same close; and by an indenture dated the 2nd of January, 1866, the same was conveyed to *Williams* in fee. The conveyance contained no restriction as to trade; but by a written agreement, not under seal, of even date between the Plaintiff and *Williams*, the latter undertook and agreed that during the term of twelve years and a half from that day no building erected on the land should "in any way be used for the sale of ale, beer, spirits, wine, porter, or as an inn, public-house, or beer-house;" and that if the same was so used *Williams* would "forfeit and pay" to *Carter* £5 for every week while the same was so used.

In February, 1866, the Plaintiff sold a third portion of the same close of land to *Samuel Brown*. *Brown's* conveyance, which was in fee, and dated the 12th of February, 1866, also contained no restriction; and he also entered into an agreement with the Plaintiff of even date for a term of twelve years and a half from the date, in the same terms as *Williams* had done, except that the amount to be forfeited and paid in case of breach was to be £4 a week.

In 1868 *Williams* purchased the fee of the last-mentioned piece of land from *Brown;* and the important question in the cause upon the evidence was, whether or not *Williams* had knowledge of *Brown's* restriction. Upon this point His Honour reviewed the evidence, and came to the conclusion that *Williams* had knowledge of it.

Shortly afterwards *Williams* built a house on this last-men-

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tioned piece of land, which, in July or August, 1868, was opened and used as a beer-shop or public-house.

In the course of the same year *Williams* let the house to the other Defendant, *Price*, as tenant from year to year, who took it, as he said—and, as His Honour held on the evidence, truly said—without notice or knowledge of any kind of the restriction; and it is with regard to the position of *Price* only that any report of the case is necessary.

Mr. *Freeling*, and Mr. *Speed*, for the Plaintiff:—

The prayer for relief against *Price* is based on *Wilson* v. *Hart* (1), followed in *Feilden* v. *Slater* (2).

[They also referred to *Parker* v. *Whyte* (3).]

Mr. *Bristowe*, Q.C., and Mr. *Blackmore*, for the Defendants:—

Here the parties have agreed that £4 a week is to represent the damage, if and so long as the house should be used for the sale of ale, beer, spirits, or wine. The Plaintiff should have sued on the agreement; and as he has this simple and sufficient legal remedy, the Court will not interfere.

In this case the restrictive agreement was not, as in the case of *Coles* v. *Sims* (4), recited in the conveyance, so that that case furnishes no authority why *Price* should be held to be affected with notice. It is not pretended that he had any actual knowledge or notice of the restriction; nor was there anything here to put him on inquiry.

Mr. *Freeling*, in reply.

SIR W. M. JAMES, V.C.:—

In this case the Plaintiff has filed his bill for the specific performance, in effect, of an agreement entered into by a person named *Brown*, that a certain property should not be used "for the sale of ale, beer, spirits, wine, porter, or as an inn, public-house, or beer-house." The agreement was made with *Brown;* it does not appear in the conveyance to him, but was a distinct agreement. There was a sale afterwards by *Brown* to *Williams*, and I

(1) Law Rep. 1 Ch. 463, 467.
(2) Ibid. 7 Eq. 523, 530.
(3) 1 H. & M. 167.
(4) 5 D. M. & G. 1.

cannot entertain the slightest doubt that *Williams* had full notice of that agreement, and of the mode in which it was made, for he had taken a similar conveyance and entered into a similar agreement himself, with regard to another portion of the same property, and he had written a letter to *Brown* intimating as a ground for reduction in price, that the property was subject to this restriction. He knew that if the property were not subject to such a restriction, the vendors would have written to say so; so that it comes to the same thing as if he had written and asked, "Is this property subject to a restriction against its being used as a public-house?" and had received for answer, "Yes, it is."

Then it has been said, there was not such an agreement here as this Court will enforce. There was a rent of £4 a week, which it is stated in the agreement that *Brown* would "forfeit and pay" to *Carter*. It was, in fact, a penal rent. But this Court is never prevented by a penalty from enforcing specific performance of an agreement.

Then it was further said there has been acquiescence of such a kind as to prevent the Plaintiff from obtaining relief. The Defendant says: "You saw me building a house, which you could see was intended to be a public-house, and you ought to have stopped the building." But the Defendant's own affidavit shews that whilst he was building the house he received letters from *Brown's* solicitors and from the Plaintiff's present solicitors on behalf of *Brown*, requiring him (the Defendant) not to make the house he was then building into a public-house; and it does not appear that there was any substantial increase of expenditure on the ground of its being a building which was about to be used as a public-house as distinct from an eating-house, a coffee-shop, or anything of that kind. He received, therefore, distinct notice of the restriction, which was followed by two letters, in July 1868, and February 1869, and, finally, by this bill on the 17th of March, 1869, at which date I think it was by no means too late for the Plaintiff to make the complaint he has done. As against *Williams*, therefore, the Plaintiff has clearly made out his case.

With reference to *Price* the case stands differently: *Price* takes the premises from year to year. There is no evidence of anything to bring home to him actual knowledge or notice of this

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restrictive agreement; and I am certainly not disposed to enlarge the doctrine of constructive notice, which I think has been already carried far enough, beyond what is necessary for the protection of mankind in the ordinary transactions of life.

In this case the grantor has chosen to have the agreement, not in the deed, but upon a separate piece of paper; so that the tenant from year to year might have seen the title-deed of his lessor without becoming aware that there was any restriction of this kind. The difficulty has arisen from the grantor's mode of carrying out the sale. The tenant from year to year might have seen everything which appeared to be necessary for him to see, and yet not have acquired any knowledge of this restriction. If he had inquired, it is reasonably certain that *Williams* would have told him there was no restriction, because *Williams* swears he did not himself know of its existence; and if he had asked for the conveyance, the deed would not have disclosed it.

I think, therefore, the Plaintiff can have no relief against *Price*, and the bill must be dismissed as against him.

As to *Williams*, there must be an injunction to restrain him in the terms of the first paragraph of the bill; but the injunction will be suspended until *Price's* tenancy has been determined, or is determinable at the earliest possible notice.

The Defendant *Williams* must pay the Plaintiff's costs, including the costs of the motion; and the Plaintiff must pay *Price's* separate costs, and add them to his own.

I do not think it a case of sufficient importance to direct an inquiry as to damages pending the suspension of the injunction.

Solicitors for the Plaintiff: Messrs. *Roberts & Simpson*, agents for Messrs. *Barber & Hughes, Bangor.*

Solicitor for the Defendants: Mr. *G. F. Cooke*, agent for Mr. *G. Tibbits, Chester.*

BIRCH-WOLFE *v.* BIRCH.

V.-C. J.
1870
March 15.

Tenant for Life impeachable for Waste—Owner of first Estate of Inheritance—Timber—Collusive Waste—Bill by Tenant for Life in Possession—Statute of Limitations.

By its inherent jurisdiction to restrain fraud, the Court of Chancery will, although the Plaintiff may have a legal remedy, interfere to prevent waste being committed by a tenant for life in collusion with the owner of the first estate of inheritance, or by a person who unites both these characters in himself; and as such a suit may be instituted by trustees to preserve contingent remainders during the life of tenant for life in remainder, so may it be instituted by tenant for life in remainder himself.

On the same principle, where waste has been committed by a tenant for life at a time when he was also owner of the first estate of inheritance, and when there was no one capable of bringing an action, a bill to make his estate accountable may, after his death, be brought by a tenant for life in possession.

But, before giving relief in a suit so instituted, the Court must be satisfied that the acts of the deceased tenant for life were such as amounted to collusion between the two characters which he united in himself. Accordingly, when it was shewn that the tenant for life, being also ultimate remainderman in fee, had laid out sums in permanent improvements on the estate at least equal to the value of the amount realized by the acts of waste, which were themselves of trivial amount, the bill was dismissed; and where the executor of a deceased tenant for life, who was also ultimate remainderman in fee, admitted having received the proceeds of certain timber cut or ordered to be cut by his testator, he was allowed, in the account to be taken against him, to take credit for the sums laid out by his testator in permanent improvements:

Semble, a claim in equity against the estate of a deceased tenant for life, who was also owner of the first estate of inheritance, for acts of waste committed by him, first arises at the death of such tenant for life, and must be made within six years of that date.

JOHN BIRCH, by his will dated the 8th of December, 1823, devised the residue of his real estate, comprising hereditaments called the *Woodhall Estate*, situate in the counties of *Essex* and *Herts*, to trustees and their heirs, to the use of *Richard Birch* and his assigns for life, remainder to the use of trustees during the life of *Richard Birch* to preserve contingent remainders, remainders to the first and other sons of *Richard Birch* successively in tail male; with remainders to uses in like terms in favour of the Rev. *William*

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Birch, brother of *Richard*, *Thomas Birch*, another brother of *Richard*, and *John Lewis Wolfe*, successively, and their first and other sons in tail male, remainder to the right heirs of the testator. It was provided that persons taking the estates in possession under the will should take the name of *Wolfe*; and the will also contained this proviso:—

"Provided also, and I do hereby further declare, that it shall be lawful for the said *Richard Birch*, and the several other persons who shall become beneficially entitled to my said estates under the limitations aforesaid, as and when they shall respectively come into the possession thereof from time to time, to fell and convert such timber and woods growing thereon (except the ornamental timber and trees in and about my mansion of *Woodhall*) as may be necessary for the repairs of the said estates."

The testator died in 1827, leaving *Richard Birch* his heir-at-law.

Richard Birch, on the testator's death, entered into possession and receipt of the rents and profits as tenant for life, and took and used the name and arms of *Wolfe*. By his will he devised the residue of his real estate, which included the reversion in fee, and of his personal estate, to his brother *William*, whom he appointed his executor.

Richard Birch-Wolfe died, without having had issue, in March, 1859. Upon his death the Rev. *William Birch* entered into possession and receipt of the rents and profits as tenant for life, and took and used the name and arms of *Wolfe*. By his will he appointed the Rev. *John Hodgson* (since deceased) and the Rev. *Henry Mildred Birch* his executors; and gave and devised the residue of his property, real and personal, to *Hodgson* and *H. M. Birch* upon trust, as soon as conveniently might be after his decease, to sell and convert the same and invest the proceeds, and stand possessed of the investments and income upon trusts for the benefit of his widow, *Marianne Birch-Wolfe*, for life, and after her decease (subject to a contingent legacy bequeathed by a codicil), as to one moiety for her appointees, and as to the other moiety for *Louisa Gwilt*, spinster.

William Birch-Wolfe died, without having had issue, in Sep-

tember, 1864. Upon his death, *Thomas Birch* entered into possession and receipt of the rents and profits, and took and used the name and arms of *Wolfe*. He had had no issue up to the present time.

This bill was filed on the 6th of May, 1869, by *Thomas Birch-Wolfe* against the Rev. *Henry Mildred Birch* and *John Lewis Wolfe*, stating that when the Plaintiff entered into possession the mansion-house and many of the outbuildings were out of repair; that each of the tenants for life, *Richard* and *William Birch-Wolfe*, felled a large quantity of timber, and wrongfully and improperly sold the same, and applied the proceeds of sale to his own use; and prayed for a declaration that *Richard Birch-Wolfe* and *William Birch-Wolfe* respectively were liable to account for the proceeds of all timber and other trees on the devised estates which were felled by them respectively, or by their respective orders, and which were not used for repairs; and that their respective estates were accountable for such proceeds, with compound interest thereon, from the respective times of the sums having been received; that the amount of such proceeds and interest might be ascertained, and for that purpose accounts taken; and that such amount might be paid out of the estate, personal and real, of *William Birch-Wolfe*; and, unless the Defendant *Henry M. Birch* should admit assets, for administration of *William Birch-Wolfe's* estate; that such amount as above-mentioned might be paid into Court in the cause, and that so much thereof as should be in excess of the amount computed up to the decease of *William Birch-Wolfe* might be paid to the Plaintiff, that the residue might be laid out under the direction of the Court in the purchase of land, and that such land might be settled to the uses of the testator *John Wolfe's* will; and that in the meantime the money might be invested in stock, and the interest paid to the Petitioners, or to the person for the time being entitled in possession to the estates.

The Defendant, the Rev. *H. M. Birch*, stated in his answer that, soon after the death of *William Birch-Wolfe*, a claim was made by the Plaintiff against his estate for dilapidations of the mansion-house and outbuildings, and that he, the Defendant, having been advised that the claim was valid as to such dilapidations and want of repair as had occurred within six months before the death, paid

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to the Plaintiff £210, the amount at which such dilapidations and want of repairs were valued.

He submitted the question of whether *Richard* and *William Birch-Wolfe* were not entitled to fell the timber and sell the same, and apply the proceeds in repairs, or, at all events, in the purchase of timber to be used in repairs.

To the best of his information and belief he denied that *Richard Birch-Wolfe* had ever felled any timber on the *Woodhall* estate.

He said he had been informed and believed that, within two years or thereabouts of his death, *William Birch-Wolfe* caused timber and other trees to be felled on the estate, and that such timber and trees were sold by his order by auction and private contract in the month of June, 1864; that after his death the auctioneers accounted to the Defendant and his co-executor in respect of such sales, and paid them the net proceeds after deducting expenses, such proceeds consisting of two sums of £392 6*s.* 4*d.* and £109 3*s.* for timber, and £72 for bark. He believed the expenses of *William Birch-Wolfe* in felling such timber were considerable, but Defendant had never been able to ascertain the exact amount of them. The above sums had been invested, and the income paid to *Marianne Birch-Wolfe.*

Defendant further claimed the benefit of the 3 & 4 Will. 4, c. 27, and all the other Statutes of Limitation.

The results of the evidence are given in His Honour's judgment. It appeared that a considerable quantity of wood had been cut by the first tenant for life, but of this a large portion consisted of thinnings of fir plantations. It was contended that these thinnings were timber; but no custom was alleged, and His Honour, in the course of the discussion, held that they clearly were not timber.

Mr. *Kay*, Q.C., and Mr. *Charles Hall*, for the Plaintiff:—

The following are authorities which shew that such a bill as this may be filed by a tenant for life.

In *Duke of Leeds* v. *Earl Amherst* (1), acts of equitable waste were committed by a tenant for life; and tenant in tail in remainder, two years after the death of the tenant for life, brought a suit in respect of them. It was shewn that he was aware of the acts of

(1) 14 Sim. 357.

waste twelve years previously, he having attained twenty-one nine years before that. Vice-Chancellor *Shadwell* held (1) that length of time was no bar. It was true, he observed, that the claim arose at the moment when the acts were committed; but at that time the Duke was an infant. Directly he attained full age, he might have filed the bill, but was not obliged to do so. Until the death of the tenant for life, the claim did not arise in such a state as that it could be barred by length of time. This was affirmed on appeal (2), Lord *Cottenham*, C., observing that the 2nd, 3rd, 4th, and 5th sections of the 3 & 4 Will. 4, c. 27, all applied more or less to the subject, and that they all gave to the tenant in tail his remedy from the time at which his estate vested in possession. In this, which was a case of equitable waste, equity would follow the law. *Garth* v. *Cotton* (3) was a case of equitable waste by collusion between tenant for life and remainder-man. The act was in 1714; the Plaintiff, a son of the tenant for life, was born in 1724; in 1727 the tenant for life died; in 1745 the Plaintiff, being tenant in tail in possession, attained twenty-one, and suffered a recovery to the use of himself and his heirs; and in 1748 filed the bill. His remedy was held to have first accrued in 1745.

In the present case the tenant for life impeachable of waste was himself the wrongdoer. This circumstance formed the distinction in *Williams* v. *Duke of Bolton* (4); which was followed by *Powlett* v. *Duchess of Bolton* (5); and the right of the owner of the first estate of inheritance to come into equity for an account is established by *Whitfield* v. *Bewit* (6); *Lee* v. *Alston* (7); and *Bagot* v. *Bagot* (8).

Here we have collusion, as in *Garth* v. *Cotton;* and, at all events, when the remedy is only an equitable remedy, the statute does not begin to run until the right of the Plaintiff falls into possession: *Duke of Leeds* v. *Earl Amherst* (9).

Had the Plaintiff been a tenant for life in remainder only, instead of in possession, he would have been entitled to file this bill,

(1) 14 Sim. 365.
(2) 2 Ph. 117.
(3) 1 Ves. Sen. 524, 546; 1 Dick. 183.
(4) 1 Cox, 72.
(5) 3 Ves. 374.
(6) 2 P. Wms. 240.
(7) 1 Bro. C. C. 194; 3 Bro. C. C. 37; 1 Ves. 78.
(8) 32 Beav. 509.
(9) 14 Sim. 357; 2 Ph. 117.

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founded on his right to the waste and shade: *Perrot* v. *Perrot* (1); *Powlett* v. *Duchess of Bolton* (2); and *Davis* v. *Leo* (3).

Mr. *Goren*, for the Defendant *John Lewis Wolfe*, supported the Plaintiff's case.

Mr. *Chitty* (Mr. *Morgan*, Q.C., with him), for the Defendant *H. M. Birch*:—

The suit is vexatious; the demand being so trifling in amount as to be beneath the notice of the Court. [Upon this point the evidence was gone into.]

Amount of injury is an important element in these cases. Where a son brought a bill against his father, who was tenant for life without impeachment of waste, for pulling up a deal floor, the Court said there must be actual spoliation to support such a bill: *Peirs* v. *Peirs* (4).

In *Phillipps* v. *Smith* (5) it is laid down that cuttings even of timber, which are not prejudicial to the inheritance, are not waste.

Pidgeley v. *Rawling* (6) shews, if any authority be necessary, that thinnings of fir plantations belong to the tenant for life.

In *Bateman* v. *Hotchkin* (7), Lord *Romilly* considered that a tenant for life impeachable for waste would be entitled to such part, if any, of the windfall of timber "as he would be entitled to cut himself," meaning such part as was proper and advantageous to the inheritance for him to have cut.

The power given in the will does not enlarge the ordinary legal rights of tenant for life, unless it be held to enable him to fell timber, and "convert," *i.e.*, sell it for repairs: *Sowerby* v. *Fryer* (8).

There is no express authority for the filing of such a bill as this by a tenant for life. There is nothing in the cases to shew that (the waste not being equitable waste) he will not be left to his legal remedy. The case of *Duke of Leeds* v. *Earl Amherst* (9), was one of equitable waste. In *Garth* v. *Cotton* (10) the cuttings were

(1) 3 Atk. 94.
(2) 3 Ves. 374.
(3) 6 Ibid. 784.
(4) 1 Ves. Sen. 522.
(5) 14 M. & W. 589, 594.
(6) 2 Coll. 275.
(7) 31 Beav. 486.
(8) Law Rep. 8 Eq. 417.
(9) 14 Sim. 357; 2 Ph. 117.
(10) 1 Ves. Sen. 524, 546; 1 Dick. 183.

large, amounting to actual spoil, and the suit was by a tenant in tail. In *Williams* v. *Duke of Bolton* (1) a very short time had elapsed since the cuttings, and the bill was a bill by trustees.

[The VICE-CHANCELLOR:—If trustees to preserve contingent remainders, who are only trustees for the life of the tenant for life, may file a bill, why should not the tenant for life himself? I do not assent to the doctrine that trustees to preserve are trustees to preserve the inheritance.]

Mr. *Chitty*:—In *Lee* v. *Alston* the Plaintiff was tenant in fee [or in tail (2)]; in *Bagot* v. *Bagot* (3) the Plaintiff was tenant in tail.

As to the statute, the case is the same as that of *Seagram* v. *Knight* (4), where the waste was legal waste, but the remedy was in equity only.

[*Lushington* v. *Boldero* (5) and the cases of *Rolt* v. *Lord Somerville* (6) and *Ormonde* v. *Kynnersley* (7), cited by Mr. *Beavan* in the note (8), and *Gent* v. *Harrison* (9); *Craig* on Trees and Woods (10) were also referred to.]

Mr. *Kay*, in reply.

SIR W. M. JAMES, V.C.:—

In this case the Plaintiff files his bill as tenant for life under a settlement which has limited all the estates by way of legal use. He was legal tenant for life in remainder after certain other persons who were tenants for life before him, with remainder to their issue, which issue never came into existence.

He complains of a wrong done to the estate, and therefore to himself as tenant for life, by two successive tenants for life; there being at that time nobody entitled to bring an action in respect of the wrong, because the tenant for life in each case was himself entitled to the first estate of inheritance.

The case is based entirely upon the authority of *Williams* v.

(1) 1 Cox. 72.
(2) 3 Bro. C. C. 37.
(3) 32 Beav. 509.
(4) Law Rep. 2 Ch. 628.
(5) 15 Beav. 1.
(6) 2 Eq. Cas. Ab. 759.
(7) 7 L. J. (Ch.) (O.S.) 150; 8 Ibid. 67.
(8) 15 Beav. 9.
(9) Joh. 517.
(10) Pages 127–140.

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Duke of Bolton (1), following *Garth* v. *Cotton* (2). *Garth* v. *Cotton* was this—the law being that the first person entitled to an immediate estate of inheritance is the only person who can recover, and that he is entitled to recover, for his own benefit, the value of all timber cut improperly by a tenant impeachable for waste; where by fraudulent collusion and wrongdoing between the tenant for life and the owner of the inheritance in remainder, such timber is cut, the Court, by its general jurisdiction to repress fraud, will interfere, notwithstanding it is a legal wrong, and there should have been a legal remedy entitling the remainderman to the value of the timber, and say, "We will not allow this fraud; we will bring the money, the value of the timber, into Court, there to be impounded and held for the benefit of the estate, and all persons interested in it." That case proceeded upon the ground of actual collusion and fraud.

Then the case presented itself in a new phase in *Williams* v. *Duke of Bolton*. In that case there was, and there could be, no actual collusion, fraud, or conspiracy, because the tenant for life and the actual immediate owner of the inheritance in remainder were one and the same person.

Now it was said "You must apply to that case exactly the same rule which was applied in *Garth* v. *Cotton*—that is to say, you must hold that the man in his character of remainderman is colluding with himself in his character of tenant for life, and you must treat him accordingly. You have only to apply that principle to this case."

I am asked to apply that principle to the case before me; and I quite agree that as far as that principle is applicable it ought to be so applied. But then, in order to apply that case, it is necessary I should be satisfied that the facts do amount to a case of actual fraud and collusion; that is to say, supposing there had not been that union of character between the tenant for life and the remainderman, but that there had been two distinct persons, and that what has been done by the tenant for life in possession had been done with the full knowledge, acquiescence, and assent of the tenant in remainder; I must be satisfied that that would have been, as between those two persons, an act of fraud and collusion with which this Court would interfere.

(1) 1 Cox. 72. (2) 1 Ves. Sen. 524, 546; 1 Dick. 183.

Now, it does not appear to me, dealing with what took place in the lifetime of the first tenant for life, that the facts come up to that, or anything like that case. When all the facts and circumstances come to be known, they amount to this: that during a period from the year 1838 to the year 1854, that is to say, during a period of sixteen years, there were cuttings which would, after making deductions in the account for cuttings of wood which clearly was not timber, amount to considerably less than £1000, being cuttings on an average of something more than £50 or £60 a year. That is not very considerable. Then there is this evidence, that during this period the same man who was making these cuttings of timber (which, having regard to the evidence before me as to the nature of the estate, and that it is absolutely crowded with timber at this time, appear to me to be of the most trivial character, though one or two of the earlier ones were rather larger) was himself laying out very considerable sums of money in repairs, improvements, and in additions to the buildings, and even in timber repairs to this extent that he is alleged to have kept two carpenters in constant employment during almost the whole period. Regard being had to that, it would in my judgment be monstrous to say that a tenant in remainder, allowing a tenant for life to cut down timber in consideration and upon condition of the tenant for life doing these things for the benefit of the estate, was guilty of any fraudulent collusion which would induce this Court to extend this somewhat extraordinary jurisdiction to him; and if there would have been no ground for the interference of the Court in the case which I have supposed of tenant for life and tenant in remainder, I cannot put the case higher when it is the same individual who is doing the same thing in his double character with regard to the estate.

I am of opinion, therefore, that it is not fitting that this Court should interfere upon what appears to me to be a trifling ground of complaint, if any ground of complaint there be, with respect to all that took place during the lifetime of the first tenant for life.

I may add, with respect to that part of the case, I think that the claim, if any claim there were against his estate, is barred by the *Statute of Limitations*. The tenant for life died a great many years ago, in 1859; and this claim of course was a claim against

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the assets of that tenant for life, and at the death of that tenant for life the claim against his estate became a present and immediate claim against his executors. It was a claim on behalf of all the owners of the estate—all the persons entitled to the successive limitations of the estate.

I know of no principle why that claim ought not to have been made within the period allowed by law for making a simple demand, that is to say, within six years, on the ground of his having received proceeds which he ought to account for. I do not see that the *Statute of Limitations* would not apply to that demand.

With respect to the second tenant for life, it appears to me that the same principles (except that of the *Statute of Limitations*, upon which I have decided with respect to the first tenant for life) apply to all the earlier circumstances which took place in the lifetime of that tenant for life. It appears to be the fact that he also has been making repairs to a considerable extent. He has paid a sum of £210 towards dilapidations which existed at his death, and with regard to which, as far as I can make out, he was under no legal liability whatever.

I think, therefore, that as to all which was received in his lifetime, the bill fails in exactly the same way as it fails against the last tenant for life.

But there happens to be an amount not altogether inconsiderable, which has been received by the executors since his death, in respect of timber which was cut, and which was not applied towards repairs on the estate. The sums are £392 6*s.* 4*d.*, £109 3*s.*, and £72, mentioned in the answer. I do not think I can direct an account of the expenses of barking or felling the timber; there seems to be no means of proving that.

Mr. *Chitty* said that it was, he believed, a fact, though not proved in the cause, that the Defendant had paid for expenses incurred by *William Birch-Wolfe* for repairs in his lifetime sums which would equal the above.

The VICE-CHANCELLOR:—

The Defendant can have an inquiry as to that, if he desires it. There will be a direction to take an account of the net value of

all timber trees felled by *William Birch-Wolfe*, and then an inquiry whether any and what sums of money were properly laid out and expended by him or his representatives in respect of the repairs of the settled estates during the whole of his life.

Mr. *Chitty* asked whether, if the parties could agree upon a sum, the decree might go in that form.

The VICE-CHANCELLOR:—Yes. The bill will be dismissed with costs so far as it seeks any relief against the representatives of the first tenant for life; and as a large portion of the bill has failed, there will be no costs on either side up to the hearing.

Mr. *Chitty* said that there was no provision in the decree in the event of the Defendant shewing a balance.

The VICE-CHANCELLOR:—If you have been laying out your money improvidently, you must take the consequences.

Mr. *Chitty*:—In that event, we shall have succeeded on the whole suit.

The VICE-CHANCELLOR:—I think, on the whole, I will not give any costs up to the hearing.

There will be liberty to apply as to the balance, if any, which is due.

Solicitors for the Plaintiff and the Defendant *John Lewis Wolfe*: Messrs. *Fladgate, Clarke, & Finch.*

Solicitors for the Defendant the Rev. *Henry M. Birch*: Messrs. *Probert & Wade.*

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In re MERCHANT'S AND TRADESMAN'S ASSURANCE SOCIETY.

Mutual Assurance Company—Transfer of Business—Policy-holder—Novation of Contract.

By the deed of settlement, dated in 1847, of the *M.* society, it was provided that the subscription capital of £100,000 in 2000 shares of £50 each should be subject to be paid off as therein provided; and in the meantime was to be deemed a guarantee fund. The general funds of the society other than the guarantee fund were to be called the "assurance fund." By a policy effected with the society in 1850, reciting that the assured had agreed to become a member of the society, three of the directors covenanted with him that if he should regularly pay the premiums they or the directors of the society for the time being would, after proof of death, pay or cause to be paid out of the funds of the society, the sum assured. In 1855, in pursuance of a resolution of a general meeting, the guarantee fund was paid off, and put an end to, and the directors and shareholders mutually released each other. By an agreement in 1858, the *M.* society and its directors, with the sanction of a general meeting, transferred to the *B.* association all the goodwill, benefit, and advantage, premiums and assets of the society; and it was agreed that all the liabilities of the society in respect of the policies should be undertaken and borne by the association. The association indemnified the society and its directors; and it was agreed that all claims in respect of policies should be paid and satisfied out of the funds of the association. In 1858 the business of the *B.* association was transferred to the *A.* company. The life having dropped, and the *B.* association and the *A.* company being in liquidation, the executors of the assured presented a Petition to wind up the *M.* society:—

Held, that the agreement in 1858 effected a complete novation of the contract entered into by the assured with the *M.* society; and Petition dismissed.

THIS was a Petition by *Thomas Stephens*, executor of *Joseph Laycock*, deceased, for an order to wind up the *Merchant's and Tradesman's Mutual Life Assurance Society.*

On the 6th of January, 1847, the society was provisionally registered under the Act of 1845 (7 & 8 Vict. c. 110). The immediate subscription capital of the society was to be £100,000, in 2000 shares of £50 each, which was to be paid off with interest and a bonus, as soon as such an amount of profits should have been realized as to make its continuance unnecessary.

By the deed of settlement, dated the 9th of March, 1847, and made between the shareholders of the first part, the directors of the second part, the auditors of the third part, the trustees of the

fourth part, and a covenantee for the society of the fifth part, the parties thereto of the first, second, third, and fourth parts covenanted with the covenantee, amongst other things, as follows:—

Clause 4 provided that, "members" was to mean "all persons who shall have assured with the society for the whole term of life on the terms of participating in the profits of the society."

The subscription capital of £100,000 was to be subject to be paid off as thereinafter provided, and in the meantime was to be deemed a guarantee fund. The general funds of the society other than the subscription capital were to be called "the assurance fund," and were to consist of all premiums, fines, and other moneys or payments to be received for policies.

Clause 22 provided that, as soon as it should appear that the net profits of the assurance fund should be equal in amount to double the amount of the bonuses, it should be lawful for the directors to convene an extraordinary general meeting, and lay before it a statement of the debts, assets, and liabilities of the society; and, subject to the direction of the meeting as to the time and place of payment, the amount paid up by each shareholder in respect of his shares, with a bonus of £5 per cent., should be paid and returned to him; thereupon the guarantee fund should be discontinued and wound up; the shareholders should be acquitted and discharged as respected the society, and indemnified by the society against strangers from all further obligations, liabilities, and transactions of the society in respect of their shares, and from all the covenants and stipulations of the deed of settlement, except as to any previous breach; thereupon the clauses and provisions therein contained, so far as the same were applicable to shareholders, should be considered at an end as respected shareholders only; and the balance then standing to the credit of the assurance fund should thenceforth form the assurance fund of the society, and be the only fund for receiving and paying all moneys on account of its business and affairs.

By clause 25, "the bonus apportioned to members in respect of any policy" fallen due since the last apportionment was to be paid forthwith; or (clause 28) be allowed in reduction of premium.

Clause 31 provided that every person proposing to become a "member" should perform and keep all the rules and regulations

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of the society, and the covenants and agreements of the deed of settlement.

By clause 54, an extraordinary general meeting might be convened on the requisition of shareholders or members of a specified number and value, and by clause 58 all members and shareholders had the privilege of attending and voting at all general or extraordinary meetings.

By clause 186 all sums to be claimed under any policy were to be paid out of the funds of the society; and by clause 189 all shareholders and members of the society were to be entitled to the same remedies against the society for the recovery of any policies, annuities, or bonuses as they would be entitled or subject to as assured if not shareholders or members.

By clause 193 the directors were empowered to make sale of or transfer on sufficient indemnity, any portion of the business, policies, or contracts of the society to any other society or company of the like nature.

Clause 239 provided that if at an extraordinary general meeting a resolution, already passed at a special meeting of directors, should be passed for dissolving the society, and the same should be confirmed, then from the time of such confirmation the society should, except for the purpose of winding up the affairs thereof, be dissolved, and the business concluded; "and save by the means aforesaid no dissolution shall be had of the society."

Clauses 240 and 241 were as follows:—

240. "Immediately upon the dissolution of the society, the directors shall, out of the funds and property of the society, pay and satisfy all immediate demands for or in respect of assurances, annuities, endowments, or other contracts or engagements, and shall, if practicable, obtain from other assurance companies an undertaking to pay and satisfy the remainder of such claims and demands, and in consideration thereof shall cause to be transferred to such other assurance company, or as the directors thereof shall appoint, so much of the funds or property of the society as shall be agreed upon between the contracting parties as sufficient, and shall cause to be done and executed all such contracts, acts, deeds, matters, and things as in the opinion of the directors shall be necessary or advisable for carrying the said arrangement into effect; and if any funds or property of the society shall remain,

after answering all claims on the society and other the purposes aforesaid, the directors shall cause so much thereof as shall not consist of money to be converted into money, and shall then cause the clear moneys or funds of the society, if any, to be divided, paid, and distributed in such manner as the directors shall think fit amongst the shareholders and members thereof for the time being, according to their right and interest therein."

241. "Notwithstanding dissolution of the society, the deed of settlement and duties of the shareholders and members, including the powers to call and hold extraordinary or general meetings, and the powers to call for and enforce the payment of further instalments on shares, or contribution from the members, shall, until all claims and demands shall have been respectively satisfied and provided, and until a final division shall have been made of the residue (if any) of such moneys or funds as aforesaid, remain in full force so far as the same may be necessary for discharging the liabilities of the society and winding up the affairs thereof."

By a policy dated the 4th of June, 1850, after reciting that *Joseph Laycock* had agreed to become a "member" of the *Merchant's and Tradesman's Society*, subject to the conditions of the deed of settlement; that the society had agreed to assure to *Joseph Laycock* the sum of £200, to be paid to his executors, administrators, and assigns within three months after his death, at the annual premium of £7 9*s.* 8*d.*; and that *Joseph Laycock* had paid the sum of £3 14*s.* 10*d.* until the 6th of December then next ensuing, and had agreed to execute the deed of settlement, or some deed in conformity thereto, when required, and had agreed to pay the annual premium by half-yearly instalments; three of the directors covenanted with the assured and his executors, administrators, and assigns, that if the assured, or his assigns, should regularly pay to the directors the annual premium, they, or the directors of the society for the time being, would within three calendar months after proof of the death of *Joseph Laycock*, "pay, or cause to be paid, out of the funds of the society," to the assured, his executors, administrators, or assigns, the sum of £200.

On the 16th of October, 1855, an extraordinary general meeting of the members and shareholders of the society was held, at which a resolution was passed to the effect that on the 1st of the following

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November, the amount of the capital actually paid up by each shareholder, with a bonus of £5 per cent. should be paid and returned to him; and that thereupon the guarantee fund should be discontinued and wound up; and by a deed dated the 1st of November, 1855, and made between the shareholders of the society of the one part, and the directors of the other part, after reciting that it had been ascertained by the directors that the net profits of the assurance funds were then equal to double the amount of the bonuses directed to be paid to the shareholders by the deed of settlement; that the directors had that day, in pursuance of the above-mentioned resolution, paid to the several shareholders the amount of the capital actually paid up by each of them in respect of his shares, with a bonus of £5 per cent.; and that, pursuant to the same resolution, the guarantee fund had been discontinued and wound up, the parties thereto mutually released each other from all demands for or on account of any matter or thing in anywise relating to the society. The directors also covenanted to indemnify the shareholders.

By an agreement dated the 25th of February, 1858, and made between the society of the first part, the directors of the second part, the directors of the *Bank of London* and *National Provincial Insurance Association* of the third part, and the trustees of the association of the fourth part, after reciting that the directors of the society had proposed to dispose of and transfer the business of the society to the association, and the directors of the association had agreed to purchase the same for considerations stated in two several agreements bearing even date therewith, it was witnessed, that the society and its directors thereby disposed of and transferred to the association all the goodwill, benefit, and advantage of the society, and all the premiums which as from the 5th of December, 1857, might or would be payable, together with the lease and all the estate, effects, and credits of the society; the trustees and directors of the association thereby agreed to enter into all necessary covenants (but so as to be binding upon the assets of the association only, and not upon themselves personally, or their respective assets,) for payment of the rent and covenants in the society's lease, and for indemnifying the society from the same.

The agreement also contained the following clauses:—

2. "The risks, engagements, and liabilities of the society, upon

or in respect of the said policies respectively, and also upon or in respect of all other the affairs and business of the society whatsoever, and notwithstanding the omission of any such risk, engagement, or liability in the account or statement hereinafter provided for, shall be undertaken and borne by the association; and the association, by their trustees and directors on their behalf, shall and will indemnify the society and the directors thereof, from and against all such the aforesaid risks, engagements, and liabilities respectively, and from and against all costs, charges, and expenses, in respect of the present agreement and the carrying of the same into effect or otherwise in relation thereto.

3. "All claims whatsoever which shall be made or become payable upon policies of the society in respect of the deaths of persons assured by them, and also upon all other the affairs and business of the society as aforesaid, shall, subject to such lawful exceptions as the directors of the society might have made, be paid and satisfied by and out of the funds of the association."

8. "The directors of the society as far as they reasonably can, will procure the several persons holding or entitled to policies or other engagements in the society, to accept in exchange for or renewal thereof policies or engagements of the association; and in all cases, whether such exchange or renewal shall or shall not be made, the association will indemnify the society and their directors against all liabilities whatsoever in respect of such policies and engagements, so long as the same shall respectively remain in force."

13. "The society shall not, after the day of the date hereof, enter into any engagement, or incur any liability whatsoever (other than such as may be necessary for carrying on the ordinary business of the society), without the consent and approval of the board of the association."

At an extraordinary general meeting of the society, held on the 26th of February, 1858, a resolution was passed confirming the last-mentioned agreement.

The Bank of London Association was not a registered company, and the liability of the shareholders was not limited, except by the terms of the life and annuity policies granted by the association.

By an agreement dated the 7th of October, 1858, the business of the association was transferred to the *Albert Life Assurance*

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Company, and the agreement was confirmed by the shareholders of the association on the 20th of October following.

On the 29th of September, 1868, *Joseph Laycock* died.

In September, 1869, the *Albert Company* was ordered to be wound up. The *Bank of London Association* was also in liquidation.

Mr. *George Thomson*, who was manager of the society from its commencement until February, 1858, deposed that, under the circumstances which he stated, namely the agreement and resolutions above mentioned, "there are no shareholders in" the society, and the society "has no capital, stock, money, funds, or assets of any description."

Mr. *Morgan*, Q.C., and Mr. *Cookson*, for the Petitioner, commented upon the evidence furnished by the policy and by the documents coming out of the possession of the societies, as shewing that there was no proof of the Petitioner's testator ever having had knowledge or notice of the transfer; but this in the end became unimportant.

The VICE-CHANCELLOR observed that the society after the release of November, 1855, appeared to have been nothing but a mutual society, without capital of any kind; that was to say, a society of which every member had a right of contribution from the rest whenever a life dropped. How could such a society as that be the subject of a winding-up order? Who was there who could be made a contributory?

Mr. *Morgan*:—

The Court has jurisdiction under the 199th section of the *Companies Act*, 1862, to wind up the company.

In cases of marine insurance companies (*In re Shields Marine Insurance Association* (1), and *In re London Marine Insurance Association* (2)), winding-up orders have been made.

The words "partnership, association, or company," in sect. 199, include dissolved companies, the assets of which have not been distributed or the debts not paid: *Ex parte Phillips* (3); *In re Warwick and Worcestershire Railway Company* (4).

Our rights are saved by the 241st clause of the deed; and by the 25th also we are entitled to immediate payment of bonus.

(1) Law Rep. 5 Eq. 368.
(2) Ibid. 8 Eq. 176, 185.
(3) 3 De G. & Sm. 3.
(4) 13 Jur. 651.

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Supposing the shares had been fully paid up we should have had a right to a winding-up order to adjust the rights of members: *In re Anglesea Colliery Company* (1). In this sense, at least, every policy-holder is a contributory. If the Court gives us a liquidator, assets will soon be found. There has been no dissolution of this company, which must be assumed to be still in existence. Every policy-holder is a creditor, and, if a creditor, why not entitled to a winding-up order? By clause 239 the rights of all members of the society are saved to them as against the company. There we find the society existing from the fact of its never having been dissolved; the provisions of dissolution in the deed itself are suspended for the purposes of winding up.

If this Petition should fail, a whole flood of actions and suits will be let loose against the society.

Mr. *Eddis*, Q.C., and Mr. *Rodwell*, for the official liquidators of the *Bank of London*, and for Mr. *Foot*, a director of the *Merchant's and Tradesman's Society*, who had been served; and

Mr. *Kay*, Q.C., and Mr. *Higgins*, for the official liquidators of the *Albert Company*, were not called upon.

SIR W. M. JAMES, V.C.:—

If I had seen the deed of February, 1858, at first, I should have stopped the argument *in limine;* that is to say, I should have endeavoured to stop it without the great waste of time which seems to me to have occurred since the matter was first mentioned.

The matter seems to me almost too plain for anything that can be called argument. The society was originally a mutual society. In 1855, the mutual association was put an end to, and the society ceased to have a guarantee fund. The society had nothing but an assurance fund, and there was a right to have payment out of that fund when the event occurred. In November, 1855, by a transaction to which the Petitioner, or the person whom the Petitioner represents, was a party, that is to say, by a general meeting of the society, all the members of the society entered into an arrangement by which, in fact, the mutual association was effectually put an end to, and then by a deed in February, 1858, by which they are all bound, all the assets of the company, including the

(1) Law Rep. 1 Ch. 555.

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In re Merchant's and Tradesman's Assurance Society.

assurance fund, were handed over to another society. That other society entered into these stipulations by the same deed:—

"The risks, engagements, and liabilities of the society, upon or in respect of the said policies respectively, and also upon or in respect of all other the affairs and business of the society whatsoever, and, notwithstanding the omission of any such risk, engagement, or liability in the account or statement hereinafter provided for, shall be undertaken and borne by the association; and the association, by their trustees and directors on their behalf, shall and will indemnify the society and the directors thereof from and against all such risks, engagements, and liabilities respectively, and from and against all costs, charges, and expenses in respect of the present agreement and the carrying of the same into effect, or otherwise in relation thereto. All claims whatsoever which shall be made or become payable upon policies of the society in respect of the deaths of persons assured by them, and also upon all other the affairs and business of the society as aforesaid, shall, subject to such lawful exceptions as the directors of the society might have made, be paid and satisfied out of the funds of the association."

After that bargain on the part of the policy-holder it is impossible for him to say that there is anything to be done as to the original society. He has no right to call on any of his brother policy-holders to pay him anything. He has no right whatever to have any funds distributed between him and them. He has his remedies, whatever those remedies may be (it is not for me to point them out), against the association which undertook to pay this policy with his consent. If there ever was a case of novation (supposing that there originally was a creditor and debtor, which there would not be here), this seems to be the most complete novation that can possibly be conceived. Whether there has been any subsequent novation as between the *Bank of London* and the *Albert* is not a matter now before me to consider. The Petition must be dismissed with costs.

The two societies will take their costs out of their own funds.

[His Honour added that one or other of the societies ought to pay the Petitioner.]

Solicitors: Messrs. *Burton, Yeates, & Hart;* Messrs. *Paine & Layton;* Messrs. *Lewis, Munns, & Co.*

In re ALBERT LIFE ASSURANCE COMPANY.

COOK'S POLICY.

V.-C. J.
1870
Feb. 14.

Winding-up—Assurance Company—Payment of Premium—Forfeiture of Policy.

A claim under a winding-up in respect of a policy of life assurance, held not to be affected by non-payment of the premium, the days of grace for payment of which expired after the commencement of the winding-up, by presentation of the Petition.

Post 713

ADJOURNED summons, raising the question whether a policy in the *Albert Life Assurance Company*, now in course of winding up, was forfeited by non-payment of the premium after presentation of the Petitions on which the order was made for winding up the company.

The policy in question was for £300, and was dated the 7th of August, 1865. It was thereby provided that in case the assured should die on or before the 6th of August, 1866, or in case he should die after that day and should have paid to the directors of the company at the principal office for the time being of the company in *London* or *Westminster*, on or before or within one calendar month next after the 7th of August, 1866, and during his life, on or before or within one calendar month next after the 7th of August in every year subsequent to the year ending on the 6th of August, 1866, the sum of £19 5*s.* 9*d.*, as the annual premium for such assurance as aforesaid, then and in either of the said cases the capital, stock, and funds of the company should (according and subject to the provisions of the deed of settlement of the company) be liable to pay to the executors, administrators, or assigns of the assured, within three calendar months next after satisfactory proof of his death should have been produced to the directors of the company, the sum of £300, together with such sum or sums, if any, as under the provisions of the deed of settlement should be appropriated to this policy by way of bonus and be added to the sum assured. It was also provided that the subscribed capital and other the funds of the said company, should (subject to all prior claims) alone be liable to answer claims by virtue of this policy, and that

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no director or proprietor of the company or other person interested therein should be in anywise personally or individually liable to answer or contribute towards answering any claim by virtue of this policy beyond the amount of the unpaid portion of his or her share or shares in the subscribed capital of the company. The following memorandum was endorsed upon the policy:—

"In the event of the assured dying within the days of grace and before payment of the premium, the policy will be held valid and effectual and the premium will be deducted from the sum assured."

The Petitions for winding up the company (on which the order was made) were presented on the 11th and 31st of August, 1869. The winding-up order was made on the 17th of September. The premium, which under ordinary circumstances must have been paid on or before the 7th of September, had not been paid, and the question in the present case, which had been selected as a representative case, was, whether the policy thereby became forfeited.

Mr. *Eddis*, Q.C., and Mr. *Lindley*, in support of the claim by the policy-holder to be admitted to prove against the company:—

The policy did not become forfeitable until the 7th of September, as the days of grace, during which payment might have been made, did not expire until then, and the winding-up commences at the time of the presentation of the Petition on which the order for winding up is made: *Companies Act*, 1862, s. 84. The premium was intercepted by the winding-up, and was no longer payable when the day on which, but for the winding-up, it would have fallen due, arrived. Policy-holders whose policies are not yet due are entitled to prove under the winding-up for the value of their policies at the commencement of the winding-up: *Companies Act*, 1862, s. 158; *Hunt's Case* (1); *Teete's Case* (2); *Ex parte Ashbury* (3).

Mr. *Kay*, Q.C., and Mr. *Higgins*, for the official liquidators:—

The compulsory winding-up did not put an end to the contract with the company, which was, that the assured should contribute

(1) 1 H. & M. 79, 84. (2) 4 N. R. 48.
(3) Law Rep. 5 Eq. 223.

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to a certain fund which was to answer the claims and obligations upon the policies, and the assured must go on paying his premiums until the time has come for sending in his claim, and proving for the amount (as valued) of his policy. In *In re Trent and Humber Company* (1) it was held by Lord *Cairns* that damages for a delay in executing a contract continued to run after the winding-up, notwithstanding the 25th rule of the General Order of the 11th of November, 1862 (in this respect affirming the order of Vice-Chancellor *Wood* (2)). So in this case the contract remained a continuing contract, notwithstanding the winding-up, and the policy-holder was not entitled to put an end to it by non-payment of the premium, and at the same time claim the benefit of it against the company under the winding-up. But in any case the question remains, whether the 25th rule of the General Order of the 11th of November, 1862, which fixes the date of the order to wind up the company as the time for estimating the value of claims admissible to proof under sect. 158, must not be adopted; in which case the claim, being in respect of a policy which at that time (September 17) had been allowed to drop, cannot be admitted.

[They referred to *Ex parte Mendel* (3); *Evans* v. *Coventry* (4).]

SIR W. M. JAMES, V.C.:—

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This case has been brought before me as a representative case, but has not, I think, been very skilfully selected. Nothing has occurred to disturb this gentleman's rights. The contract on the part of the company was, that if he should, on or before a certain day in every year, pay a certain sum, their assets should be liable to pay his representatives a certain sum on his death. He was under no contract with the company; it was simply this, that he had to perform a condition the performance of which entitled him to certain benefits. Then, before the day arrived on which he was to perform the condition in the year 1869, the company rendered it absolutely impossible by their own act for him to perform that condition; because the condition was that he should pay the premium to the directors of the company within a month next

(1) Law Rep. 4 Ch. 112.
(2) Ibid. 6 Eq. 396.
(3) 1 D. J. & S. 330. 10 Jur N S 1084
(4) 25 L. J. (Ch.) 489: 3 D. M. & G. 835. 2 Jur N S 557, 3 Jur N S 1285

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after the 7th of August, and when that period arrived the directors had ceased to act. Their functions had all been destroyed by the intervention of the winding-up proceedings, the effect of which is to put the whole funds and assets out of the hands of the company into the hands of an official liquidator, who is simply to apply them in payment of debts ascertained by this Court. By their own act the company have determined the contract for all practical purposes, and his claim cannot be affected by non-payment of the premium after presentation of the Petition to wind up.

I am also of opinion that the result is wholly unaffected by the case which was cited where damages were given against a company which sought to be relieved from their contract by a winding-up (*In re Trent and Humber Company* (1)). The effect is, not that the company are relieved from their contract, but that the winding-up determines the contract, and all the consequences from the company being unable to fulfil its contract must follow. The claim is therefore proveable notwithstanding the non-payment of the premium after presentation of the Petition.

Solicitors: Messrs. *Mercer & Mercer;* Messrs. *Lewis, Munns, & Co.*

V.-C. J. 1870 *April* 30; *May* 2, 12.

In re ALBERT LIFE ASSURANCE COMPANY.

BELL'S CASE.
KERR'S AND STUBBS' CASES.
BLEACKLEY'S CASE.
CRAIG'S EXECUTORS' CASE.
WILSON'S CASE.

Assurance Company—Winding-up—Policy-holders—Amount of Proof—Principles on which Estimate to be made.

By policies of assurance it was witnessed that in case the insurers should at their respective deaths have paid to the directors of the assurance company the premiums therein respectively mentioned, the capital, stocks, and funds of the company should be liable to pay to the executors, administrators, or assigns of the insurers respectively the sums thereby respectively assured; and it was provided that the subscribed capital and

(1) Law Rep. 6 Eq. 396; 4 Ch. 112.

other the funds of the company should, subject to all prior claims, alone be liable to answer claims by virtue of the respective policies, and that no director or proprietor of the said company, or other person interested therein, should be personally liable to contribute to any claim by virtue of the respective policies, beyond the amount of the unpaid portion of his shares in the subscribed capital of the company.

The company having been ordered to be wound up:—

Held, that a policy-holder was entitled to prove for the sum which would be required by a solvent assurance office, having the same rate of premiums and the same extent of proprietary capital as the company in liquidation, to be paid, in order to give the policy-holder a policy of the same amount, under the same conditions, whether ordinary or special, at the same premium.

The time for ascertaining the age of the assured, to be the expiration of the period covered by the payment of the last premium before the winding-up order.

The choice of the office to be given neither to the policy-holder nor to the liquidator, but to be settled in Chambers.

No difference to be made in the case of participating policies, the chance of making profit having been speculated for and lost; except that where bonuses had been declared and not paid, the amount of such bonuses was to be added to the sum originally assured, and the total taken as the sum assured for the purpose of the estimate.

Where a change of circumstances had rendered a special contract of assurance necessary, such contract to follow the same rules.

The amounts necessary to be paid in order to obtain the above policies to be the same as if all the contracts were parts of one general bargain.

No shareholder to be liable to any one claiming by virtue of the policy beyond the amount of his unpaid capital; but all expenses not included within the contract to be borne by the shareholders.

After the funds had once reached the hands of the liquidator, no priority, one over another, to be allowed in respect of claims arising from the dropping of lives before the winding-up.

After the date of the winding-up order, the value of each claim to be struck at the time of first taking in such claim; the subsequent death of the assured before proof, not to entitle the policy-holder to full payment, but to be admissible as evidence of the value of the life.

THESE were five summonses, adjourned from Chambers, raising by direction of the Vice-Chancellor, several representative cases, for the purpose of taking the judgment of the Court as to the principles on which the amounts for which policy-holders were to be admitted to prove against the assets of an assurance company in liquidation ought to be estimated.

By an order, dated the 17th of September, 1869, the *Albert Life Assurance Company*, was ordered to be wound up compulsorily, on two shareholders' petitions, presented respectively on the 11th and the 31st of August preceding.

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Bell's Case.

Kerr's and Stubbs' Cases.

BELL'S CASE.

JOHN DAVID BELL, who was born on the 27th of June, 1825, on the 25th of September, 1865, effected a policy with the *Albert* for £2000 on his own life, on the Indian scale, without profits. Instead of being calculated at the scale applicable to his then age of forty-one years, the policy was granted by the directors on a scale calculated as if his age had been forty-six years.

Mr. *Bell* had paid premiums amounting in the aggregate to £331 14*s.* 3*d.*

The policy, which was dated the 4th of October, 1865, witnessed that in case the said *J. D. Bell* should at his death have paid to the directors half-yearly the sum of £59, "the capital, stocks, and funds" of the company, should be "liable" to pay to his executors, administrators, or assigns, the sum of £2000. The instrument also contained the following proviso:—

"Provided also that the subscribed capital, and other the funds of the said company shall, subject to all prior claims, alone be liable to answer claims by virtue of this policy, and that no director or proprietor of the said company, or other person interested therein, shall be in anywise personally or individually liable to answer or contribute towards answering any claim by virtue of this policy, beyond the amount of the unpaid portion of his or her share or shares in the subscribed capital of the said company."

The same form of words, so far as it is quoted in inverted commas above, occurred in all the subsequently mentioned policies.

Mr. *Bell* sent in a claim on the 3rd of December, 1869, to be entitled to rank against the assets for the total amount of premiums paid by him.

KERR'S AND STUBBS' CASES.

ON the 5th of November, 1863, Messrs. *Hallett, Ommaney, & Co.*, effected with the Company a policy on the life of *John James Kerr*, for the sum of £100 without profits, at the half-yearly premium of £4 7*s.* 7*d.*

Since the order to wind up the Company, Mr. *Ommaney* had endeavoured to re-insure the life of Mr. *Kerr*, but without success, in consequence of his being above the age of sixty-seven years.

On the 27th of October, 1865, *Edward Stubbs*, being then under thirty-three years of age, effected a "whole-world" policy with the company on his own life for the sum of £300, with participation in profits, at the annual premium of £10 6*s.* 9*d.*

In October, 1869, a proposal was made to the *Provident Life Assurance Office* for a re-insurance of the life of Mr. *Stubbs*, but the proposal was not accepted by reason of his health. In fact, his life was uninsurable, except upon special terms.

This summons was an application on the part of Mr. *Ommaney*, that he might be admitted a creditor in respect of the policy of £100, a re-insurance on the life of *John James Kerr* having become impracticable: and a like application on the part of *Edward Stubbs*, in respect of the policy for £300.

BLEACKLEY'S CASE.

DAVID BLEACKLEY was the holder and owner of two policies, dated the 25th of February, 1853, and originally effected by *William Willshaw* in the *Merchants' and Tradesman's Mutual Life Assurance Society*, one being for £250 with profits, effected on the "half-premium plan" on his own life (he having been born on the 15th of March, 1801), as from the 9th of December, 1852, at a yearly premium of £12 11*s.* 2*d.*; and the other for £250, effected on the life of *Elizabeth*, his wife (she having been born on the 11th of November, 1804), as from the 25th of December, 1852, at a yearly premium of £10 12*s.*

On the former policy was endorsed the following memorandum:—

"On a policy on the 'half-premium' plan, the payment of one-half of the premium for the first five years may be withheld, and the half premium so withheld may be paid to the society at any time during the continuance of the policy for which the assurance shall be effected; and such withheld half-premium, while unpaid, shall bear interest at £5 per cent. per annum, and which interest

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shall be paid to the society from time to time on the respective days on which the withheld premiums would otherwise have been paid, and shall be considered as forming part of the premium for the time payable in respect of the assurance. Every portion of the premium so withheld which may not be paid during the continuance of the policy, shall be deducted by the society out of the sum assured, when the same becomes payable.

	£	s.	d.
"The first payment, being one-half of the premium and interest of the other half . . .	6	11	10
„ Second	6	18	1
„ Third	7	4	4
„ Fourth	7	10	7
„ Fifth	7	15	10
"Amount of withheld premium at the end of fifth year	31	7	11
"Future payments until the withheld half-premiums shall be paid off	14	2	7
"Future payments when the withheld half-premiums shall be paid off	12	11	2."

Indorsed on the other policy was the same memorandum, with a similar table of payments, calculated on a premium of £10 12*s.*

On the 25th day of February, 1858, the business and effects of the *Merchants' and Tradesmen's Society* were transferred to the *Bank of London Insurance Association*, the business of which in October, 1858, was transferred to the *Albert*.

On the 21st of January, 1859, the above two policies were assigned by *William Willshaw* to Mr. *Bleackley*.

Mr. *Bleackley* deposed, that the total payments of *W. Willshaw* and himself on the first policy from its commencement until the *Albert* went into liquidation, amounted to £207 10*s.*, being as follows: premiums, £182 1*s.* 11*d.*; interest, £23 16*s.* 10*d.*; fines, £1 11*s.* 3*d.*; and the total payments on the second policy to £175 8*s.* 11*d.*; consisting of premiums, £153 14*s.*; interest, £20 3*s.* 8*d.*; fines, £1 11*s.* 3*d.*

Two bonuses of £7 4*s.* 7*d.* and £7 6*s.* respectively had been declared in respect of the first policy; and two of £6 11*s.* 7*d.* and £6 12*s.* in respect of the second.

The summons was that Mr. *Bleackley* might be admitted to prove for the sum of £349 4*s.* 7*d.*

CRAIG'S CASE.

THIS summons was taken out by the executors of *James March Craig*, M.D., who at the time of his death held two policies in the *Albert* for £200 each, with profits, upon which all premiums were duly paid.

Dr. *Craig* died on the 5th of November, 1869.

The executors had sent in a claim to the liquidators, and by this summons called upon them to shew cause why they should not be allowed to prove for the same.

WILSON'S CASE.

ON the 4th of September, 1861, *William Wilson* effected a policy with the *Albert*, on the joint lives of himself and *Anne Elizabeth* his wife, for £500, with profits, at a half-yearly premium of £13 1*s.* 8*d.*

Anne Elizabeth Wilson died on the 4th of May, 1869. At that time a bonus of £17 15*s.* had been declared on the policy, and a half-yearly premium of £13 1*s.* 8*d.* was due, so that *William Wilson's* claim against the company amounted to £504 13*s.* 4*d.*

The claim had been admitted by the directors, and Mr. *Wilson*, on the 27th of May, had been informed that on the 23rd of August following the above sum would be payable at the *Albert* office.

Mr. *Wilson* claimed that this amount might be allowed by the official liquidators, and that the sum might be paid in full by the liquidators "out of the capital, stock, funds, and other assets of the said company, in full or otherwise, in priority to the costs of the winding-up, and of the realization of the assets of the company; as also in priority to all claims which may be established either upon policies of assurance, the claims in respect of which had not been admitted by the said company prior to the commencement of the winding-up, as also to all debts which may be established against the said company, but not in respect of any assurance otherwise effected therewith."

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The opinion of Mr. *John Hill Williams*, an actuary, who had been consulted on behalf of the official liquidators, and who deposed to the following effect, was referred to:—

Mr. *Williams* said he had been consulted as to the mode of estimating proofs upon (A) policies without profits, on existing insurable lives; (B) policies with profits on the same, but upon which no profits had been declared; (C) policies with profits on the same, where profits had been declared. Four modes had been suggested:—1. To take the present value of the sum assured, and deduct the value of the gross premium, calculating such premium as an annuity for the life of the assured; 2. To ascertain the amount which would be required to be paid to another office in order to obtain a policy for the same amount at the same premium; 3. To ascertain the fair surrender value of the policy which would have been given if the office had been a going concern, *plus* a reasonable amount, having regard to the fact that the assured was obliged to submit to the realization; and 4, to ascertain the amount of premiums paid, and allow a proof for such amount, either with or without interest. The objection to the first mode was, that a policy without profits would prove for more than a policy with profits. Upon the second, he observed that if the claimant was to be at liberty to select his own office the result would work out unequally. He thought that no difference should now be made in the proof of a policy with and of a policy without profits, all claim for profits having *ipso facto* lapsed. The fourth plan he thought to be unjust, because it proceeded on the footing of an entire failure of consideration, which had not taken place; and he advocated the third plan with some modifications.

Mr. *Fry*, Q.C., and Mr. *Cookson*, for Mr. *Bell*:—

The winding-up order was made on two shareholders' Petitions, and therefore was not a proceeding *in invitos*.

We say Mr. *Bell* is entitled to claim at his election, either the amount of the premiums which he has paid, with interest at 5 per cent. from the respective times of payment; or such a sum of money as, if paid to an assurance office of his selection, would enable him to effect in such an office a policy for the same

amount as he held a policy for in the *Albert*, at the same rate of premium.

Mr. *Bell* was prepared to elect to take the former.

At law, two courses were open to Mr. *Bell*. He might have sued the company for money had and received, upon the total failure of the consideration for which it was paid.

Or secondly, he was in this position: the company had contracted to keep a certain estate to be liable to meet his demands, whenever his claim should arise. Instead of fulfilling their contract they had done something which had made its performance impossible. Having bargained that their funds and assets should be liable to pay the policy-holder, they had broken their contract by rendering it utterly impossible that the funds and assets of the company should be so applied, because the winding-up had put the whole funds and assets out of the hands of the company into the hands of an official liquidator, who was simply to apply them in payment of debts ascertained by this Court: *In re Cook's Policy* (1). That being so, Mr. *Bell* had a claim against the company generally, and not merely to the extent of the shareholders' liability on this particular contract. A mere charge upon an estate gives me a remedy to the extent of that estate only; a breach of contract entitles me to damages against the shareholders personally, and consequently without statutory limits: *Evans* v. *Coventry* (2).

If they pay me *cadit quæstio*, but if not, I may choose my remedy.

The VICE-CHANCELLOR:—How can you say there has been a total failure of consideration? During four years you were insured.

Mr. *Fry*:—Mr. *Bell* did not die in that interval. The point was discussed by Vice-Chancellor *Malins* in *In re International Life Assurance Society, Warner's Claim*, March, 29, 1870.

[The VICE-CHANCELLOR said it was clear from the short-hand note that Vice-Chancellor *Malins*' remarks did not amount to a decision on the point.]

Having selected the *Albert* we ought to have the selection of the new company.

(1) *Ante*, p. 703, 5, 6.

(2) 3 Drew. 75; 5 D. M. & G. 911.

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Craig's Executors' Case.

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The Vice-Chancellor:—If you claim under the contract you must plead the contract.

Mr. *Fry* and Mr. *Cookson*:—This was not a mutual contract. Mr. *Bell* could not be compelled to keep down the premiums. But if he did pay the premiums he could claim against the company. It is not a claim upon a contract; it is a claim by reason of a contract having been broken: *McIntyre* v. *Belcher* (1); *Greenwood's Case* (2). Here the company never can perform its contract, and the question is, what is the measure of the deduction which is to be made in favour of the company by reason of that part performance of the contract to which your Honour has referred. It must be something which will vary directly with the amount of the premiums and indirectly with the age of the assured.

Mr. *Amphlett*, Q.C., and Mr. *Locock Webb*, for *Kerr & Stubbs*:—

The best course will be to calculate the present value of the whole amount insured, and deduct the present value of an annuity equal to the premium. Or let the assured name half-a-dozen offices, and let the liquidator select; or allow a claim by the policy-holder for the whole amount of the sum insured, and then impound that amount, allowing a dividend when it is paid out. The only difficulty would be that further dividends would have to be declared.

The Vice-Chancellor said he had no funds to impound; moreover the winding-up would not be concluded within a reasonable number of years.

Mr. *Amphlett*:—In determining the time at which the Court will fix the value of those lives, I submit the principle will be the same as in that of annuities: *Todd* v. *Bielby* (3); *Potts* v. *Smith* (4).

The Vice-Chancellor:—The last moment at which the facts will assist is taken, and the value of the policy is calculated from that date.

Mr. *Amphlett*:—Then there is the case represented by Mr. *Stubbs*

(1) 14 C. B. (N.S.) 454. (3) 27 Beav. 353.
(2) 3 D. M. & G. 459. (4) Law Rep. 8 Eq. 683.

of a participating policy. As there are no future profits to be had the value of the annuity ought to be calculated, not upon the premium payable in this participating policy, but upon the premium which would have been payable if the policy had not been a participating policy. The contract was upon the footing that the business would be a continuing business.

The Vice-Chancellor :—If it had been a continuing business it might have made no profits, and in the only result which it is possible to ascertain it has made no profits. You have taken your chance of profits and lost it. You are not bound to contribute to the loss.

Mr. *Amphlett* :—But here the company themselves have broken the contract.

The Vice-Chancellor :—That is a fallacy. The company have not broken the contract except by failure of means. Somebody may have mismanaged the assets, and if so, a special case may be made; but the bargain after all is only this: That the assurance fund and the capital of the company are to be the fund against which the assured can go. Suppose from an epidemic the whole capital had been expended in paying assurances upon old lives, that would have been no breach of the contract. Every assurance office must be more or less a mutual assurance office, the proprietors' capital being only a guarantee fund.

Mr. *Amphlett* :—Suppose the case of the company assigning its assets to a new company. Is the new company to have the benefit of our premiums, and give us no share of profits?

The Vice-Chancellor :—That is the risk you took. Suppose the company to have been just solvent, they might have ceased to take any new risks; they were not bound to go on upon the chance of making profits.

Mr. *Fry*, Q.C., and Mr. *Whitehorne*, for Mr. *Bleackley*.

Sir W. M. James, V.C. :—

It appears to me that there is a principle which solves all the

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difficulties with regard to the nature of the contract that was entered into.

The contract with an assurance office is, that out of the assurance fund contributed by the assured, and out of the capital of the society certain sums shall be paid in certain events. That is to say, if *A.* pays a certain annual premium during his life, the company will pay the sum assured out of the assurance fund. The bargain is, that a certain fund or capital shall be forthcoming to meet the claim.

Now, circumstances have rendered it quite certain that this company cannot go on; that is to say, they are being wound up because it is certain that they will have no means of fulfilling their engagements. To that extent, it may be said that there is a breach of contract, because there is not a fund forthcoming. Then, how are you to measure what the loss or damage is that a person has sustained? It appears to me it is to be looked at in this way: What is the sum which in every case would be required to have a policy of the same character—I am speaking now of non-participating policies—as the policy which the policy-holder has in the *Albert?* In looking at that the mutual assurance character, which necessarily applies to every assurance office, is to be taken into consideration. It is not that which you would have to pay to an assurance office selected by you; it is not that which you would have to pay to an office selected by the *Albert;* but it is that which you would have to pay to a substantial and solvent company with a substantial proprietary capital, something like that of the *Albert*, or other equivalent guarantee fund, having exactly, or as nearly as possible, the same rates of assurance as the *Albert* had; because part of the security a man takes is the rate of assurance. If a man assures his life in an office that takes high premiums he has got the security of the high premiums contributed by others. If he assures his life in a low premium office he pays the lower premiums, and he has got the security of those lower premiums only. Therefore what I say is, find me an office if you can, whose rates of premium are substantially the same as the *Albert*—any office that has got a guarantee fund as substantial and as large as the *Albert's*—find me an office of that kind, that is, a company that has got a substantial business; satisfy me that it is so; and then find what money would be required to pay that office in each case to continue

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the liability of the *Albert* upon the existing policies, at the same premiums.

If that money be forthcoming, the policy-holder is not prejudiced at all. He goes there and gets exactly as good a security; he is in the same position for all practical purposes as he would have been in if the *Albert* had continued business. No doubt he selected the *Albert*; but it cannot be said that he selected the *Albert* from any affection for any particular shareholder in the *Albert*. It is this: the *Albert* represented to him not Mr. so-and-so or Mr. so-and-so, directors at a particular time or shareholders at a particular time; it represented to him an office with a certain amount of business and a certain amount of capital paid up, and an office creating an assurance fund by premiums assessed at a certain rate. If you can find an office of that kind, and you can give him a policy of exactly the same description, then he is neither better nor worse off than he was the day upon which the winding-up took place. It appears to me therefore that, as a jury, I should say that is the exact amount of damage I should give. If I failed to give a man a horse which I had contracted to sell him, if I could shew that he would, for a certain sum of money, get exactly the same kind of horse, that is the amount of damage he has sustained.

With regard to the participating policies, it appears to me that I cannot make any difference. No doubt the participating policy-holder will be worse off, because I cannot give him a share of profits in the new office I have imagined. His bargain was that he should share in the profits of the *Albert*. He was himself, more or less, in a certain degree a partner. He took upon himself the chance of that office making a profit. As things have turned out now no profit can possibly be made. At the time of the winding-up his bargain was this: for £100 a year, we will say, which he was to pay during his life, he was to receive £3000 at his death; in addition to £3000 he was to receive a certain thing, x, which was to represent profits. Now, in estimating any damage, I am to take into consideration that he was to be paid £3000 and x. I am satisfied as a matter of fact, that x is to be converted into zero; and, therefore, for £100 a year, in the events which have happened, he was to have £3000 plus zero. That is the basis of calculation in that case. It is true this man might

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Bell's Case.

Kerr's and Stubbs' Cases.

Bleackley's Case.

Craig's Executors' Case.

Wilson's Case.

say, "But there is another man whose age and life were exactly the same as mine. I have for years paid £100, he has only paid £95; and yet you provide him with a new policy for the same amount as mine, I paying the £100 and he paying the £95 for the rest of our respective lives." That may be. He did not choose to enter into a speculation, and you did choose to enter into a speculation. You are not, it is true, to contribute *quâ* partner to the losses, but, having taken the chance of making profit you cannot complain of the result of the speculative policy that you entered into; you cannot complain that the result of the winding-up has put you upon less favourable terms than the person who did not enter into the speculat on with a chance of getting profit. So far as the speculation has resulted in an ascertained profit, so far as it has resulted in a bonus being declared, so far as it has resulted in cash paid, so far as it has resulted in a diminution of premium—all that is settled and bound by the contract between the parties. I must act accordingly, and take each contract exactly as it stands, considering that the chance of profit is now reduced to *nil*.

If a bonus has been declared and not received, he will add that to the policy. If the bonus has been received there is an end to it.

As to the limit of the liability, it appears to me that the limit must extend to any one claiming under the contract. That seems to me to be laid down in *Evans* v. *Coventry* (1). The limit of liability is fixed by the contract itself. The bargain was, that no shareholder should be liable under or by virtue of that contract to more than the unpaid portion of his calls, whether the cause of action be called a breach of contract or anything else. One can easily imagine a case where the claimant may have a further remedy. He might say, "Under the contract I am entitled to no more than this, but you have been fraudulently dealing with the assets." That would be a distinct equity to be dealt with *dehors* the contract; that would be the subject of a totally distinct claim.

But although the assured are limited to the amount of the unpaid capital for the purpose of the contract, everything *dehors* the contract is to be borne by the shareholders. You cannot throw

(1) 5 D. M. & G. 911.

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any of the expenses of the winding-up upon the policy-holders. The expenses of winding up would not be limited to that extent. The shareholders must make the best terms they can. Every farthing of the forthcoming assets payable under these contracts will have to go in satisfaction of the contracts. Everything else connected with the matter will have to be borne by the shareholders.

Mr. *Bell* will, of course, be entitled to have an assurance policy permitting him to go to *India*, just in the same way as his original policy permitted.

As to the lives, it will be assumed, until the contrary is shewn, that they are all in a normal state; that no other change has taken place than that which arises from the advance of age. If, in addition to that, either from accident or illness, a higher rate of assurance is required, that must be added to the proof. That is one of the things which the office has assured against, and the chance of life has diminished.

Where a life was not perfectly good when originally assured, and a man, say of forty-five, was assured as if he were fifty, if five years were added on to his life originally the same number of years must be added on now. He must be treated as if he were continuing to pay at the higher rate.

With regard to the particular office, it would be a very good thing if the shareholders could arrange to go to a particular office. I cannot, of course, compel them to go to any particular office; but the bargain to be made with the office, whatever it be, would be a wholesale bargain. Saving agency and commission, much better terms will be got for the shareholders and for the policy-holders both.

Proposals with regard to the particular office may be brought before me in Chambers.

Mr. *Fry*, Q.C., and Mr. *Lindley*, for Dr. *Craig's* executors:—

The question is, at what time is the amount proveable to be ascertained? In *Kellock's Case* (1), the Lord Chancellor (then Lord Justice Sir *W. Page Wood*) said he thought the debt was to be taken as it stood at the time when the claim was put in. This

(1) Law Rep. 3 Ch. 769, 779.

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view accords with the General Order under the Act of 1862, Rule 20.

Mr. *Kay*, Q.C., and Mr. *Higgins*, who appeared on all the applications, for the official liquidators of the *Albert*, referred to *In re Trent and Humber Company* (1).

The VICE-CHANCELLOR:—In this case the policy-holder will prove for the full amount of the policy. You only calculate chances when you are obliged to do so.

If a man carries in a claim and that claim is adjudicated upon, and he should die before actual payment, the death afterwards will make no difference. The proof will be for the amount at the time when the claim is taken in. I draw the line at the moment when a man carries in his claim, even before adjudication. If a man thinks his state of health is so bad that there is a chance of his dying before the winding-up is completed, he must judge for himself. But when he has once taken in his claim, the door is shut.

Mr. *Amphlett*, Q.C., and Mr. *Joyce*, for Mr. *Wilson*:—

We claim priority over the other creditors, on the ground of special contract. Our claim was admitted before the winding-up.

Mr. *Kay*:—The point has been decided against the applicant in *In re State Fire Insurance Company* (2).

Mr. *Amphlett*:—That case has no application. The question there was between policy-holders and creditors, all having demands which ripened into claims.

The VICE-CHANCELLOR:—It has been settled in these cases that there is no equitable charge upon the assets. It is a mere debt. The moment the assets get into the hands of the official liquidator, there being no equitable charge on any part of the assets in favour of any particular person, it is a mere debt.

The words of the policy no doubt furnish a very plausible argument, but the rational conclusion is, that they do not make the assured the mortgagee of any particular part, so as to entitle him to take the assets. It merely indicates a mode by which he is to be paid.

(1) Law Rep. 4 Ch. 112.

(2) 1 D. J. & S. 634.

The costs, as between solicitor and client, were arranged to come out of the estate.

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1870
BELL'S CASE.

May 12. The case was mentioned again to-day on two further points.

KERR'S AND STUBBS' CASES.

After some discussion,

BLEACKLEY'S CASE.

THE VICE-CHANCELLOR held that the time at which the age of an assured life was to be taken for the purpose of estimating the amount of damage for breach of contract, was to be the expiration of the period covered by the last premium, payable and paid, before the winding-up order.

CRAIG'S EXECUTORS' CASE.

Also, that the dropping of an assured life after claim taken in, and before proof, though it would not entitle the policy-holder to full payment, would yet be taken into consideration by the Court, as affording evidence of the value of the life at the time of taking in the claim.

WILSON'S CASE.

Solicitors: Mr. *R. T. Lattey;* Messrs. *G. S. & H. Brandon;* Messrs. *Mackenzie, Trinder, & Co.;* Messrs. *Burton, Yeates, & Hart;* Messrs. *Brooksbank & Galland;* Messrs. *Lewis, Munns, & Co.*

In re SANKEY BROOK COAL COMPANY.

V.-C. J.
1870
Feb. 15.

Company—Call—Mortgage of Proceeds of Call.

Upon the understanding that a call should at once be made and the proceeds deposited to await the maturity of two promissory notes to be renewed in pursuance of the arrangement, a bank, the creditors of a company for money properly borrowed, agreed to renew the notes of the company. The call was accordingly made, and the notes subsequently renewed:—

Held, that the mortgage to the bank being of the proceeds of a call already determined upon, was distinguishable from an attempt to pledge future calls, and was consequently valid.

APPLICATION by summons adjourned from Chambers on the part of the *Alliance Bank, Limited*, that the official liquidators of the *Sankey Brook Coal Company, Limited*, might be ordered to apply the balance of the call made on the 9th of August, 1869,

V.-C. J. 1870 *In re* Sankey Brook Coal Company.

towards the payment of the amount due to the applicants in respect of a sum of money, advanced by them to the said company upon the security of the assignment of such call.

For several years the *Sankey Brook Company* had a credit with the *Alliance Bank* of £10,000, secured by promissory notes given in the name of the company, and from time to time renewed. In the course of last summer the bank refused to continue this credit, and required the company to pay off the debt. On the 2nd of August, 1869, the directors of the company wrote to the bank stating that they had no means of meeting the claim upon the notes for £6000 and £4000, which fell due upon the 6th and 31st of August respectively, if it was pressed at once (the result of which would be to make an entire shipwreck of the colliery), and proposing an arrangement by which the bank were to renew the promissory notes for £6000 and £4000, falling due that month, by two notes for £5000 each at two and four months, upon the understanding that a resolution was passed at the half-yearly meeting of the company on the 9th of August, 1869, calling up 5*s.* per share of the company's uncalled share capital; the proceeds of such call to be deposited with the bank to await the maturity of the notes. It was estimated that the call would yield more than £5000, and in the meantime the directors anticipated being able to sell the colliery and pay the balance of the debt out of the proceeds; but should they not succeed in selling, another call of 5*s.* would be made to meet the second promissory note.

This arrangement was accepted by the bank and confirmed at a meeting of the directors of the company. At the meeting of the 9th of August, 1869, a resolution was passed for making a call of 5*s.* per share, to be paid to the company's bankers, the *Alliance Bank*, on the 13th of September, 1869. The old notes were thereupon given up by the bank, and the new ones taken in exchange.

On the 17th of September a resolution was passed for winding up the company voluntarily, and the liquidators gave notice that calls still unpaid were to be paid to them and not to the *Alliance Bank*.

Of the call made on the 9th of August only about £3000 had been paid into the bank on the 17th of September. The balance had been received by the liquidators, and in respect of this balance

the present claim was made by the bank, who had upon Petition obtained an order for a winding-up under supervision.

It was provided by the articles of association, cl. 29, that the directors may from time to time, under a resolution of the company made in ordinary general meeting (at which meeting there should be present in person or by proxy two-thirds in number and value at the least of the shareholders of the company), borrow, and after repayment of any money so borrowed may again from time to time reborrow, on mortgage or debenture or bond, any sum or sums of money, not exceeding in the whole £20,000, and at such rate of interest as to the directors should seem reasonable; and in order to secure the repayment of the moneys so to be borrowed and the interest thereof, and any lawful or usual costs, charges, and expenses, the directors may pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company; and in any such mortgage there may be inserted, should the directors think fit, a power of sale and all other usual powers, provisoes, agreements, and declarations; and every such mortgage, debenture, and bond shall be under the common seal of the company and countersigned by two directors and the secretary.

Mr. *Kay*, Q.C., and Mr. *W. F. Robinson*, in support of the summons, contended that a good equitable debt binding upon the assets of the company had been created in favour of the *Alliance Bank* by the resolutions of the directors; and that a call might be validly mortgaged to secure payment of such a debt: *In re Humber Iron Works Company* (1); *Watts* v. *Porter* (2). Having power by the articles of association to borrow and pledge the property of the company, the particular form in which the contract was executed was not material to its validity: *In re Athenæum Life Assurance Society* (3).

Mr. *Fry*, Q.C., and Mr. *G. B. Finch*, for the liquidators:—

Directors have no power to mortgage future calls under a power to borrow on the security of the funds or property of the company: *Stanley's Case* (4); and debentures charging "all the lands, tenements, and estate of the company, and all their undertaking, as a

(1) 16 W. R. 474, 667.
(2) 3 E. & B. 743.
(3) 4 K. & J. 549.
(4) 33 L. J. (Ch.) 535.

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security," have been held not to include the unpaid existing calls and the future calls: *King* v. *Marshall* (1). If future calls could be mortgaged the directors would be prevented from exercising a proper discretion as to calling up capital. *In re Humber Iron Works Company* (2) is distinguished, as there the mortgage was of the arrears of a call already made.

Sir W. M. James, V.C.:—

This case has, in my opinion, been very properly brought before me. The point appears to be new, but there is nothing in the law to prevent the Court from doing that which the honesty of the case requires. The case is not governed by those in which a company has assigned all future calls or all calls for an indefinite period, or has assigned all its estate and effects, and the question has been whether such assignment comprised future calls. The principle on which those cases were decided was, that calls should be made at the discretion of the directors, and an assignment of future calls prevented the exercise of such a discretion. Here the call assigned was one which had been already determined upon, and I cannot distinguish it from the case of a mortgage of the arrears of a call already made but not yet paid. There was nothing to interfere with the discretion of the directors. Moreover, the transaction was not completed until after the call was made. There will be an order in the terms of the application, and the costs of the bank will be added to their debt.

Solicitors: Messrs. *Sharpe, Parkers, & Pritchard,* for Mr. *Peace, Wigan;* Messrs. *Flux, Argles, & Rawlins,* for *Bateson, Robinson, & Morris, Liverpool.*

(1) 33 Beav. 565. (2) 16 W. R. 474, 667.

Ex parte AGRA BANK.
In re BARBER & CO.

C. J. B.
1870
Feb. 2, 9, 16.

Bankruptcy—Proof against the Estate of a Surety—Letter of Credit—Bills drawn on behalf of a Company—Companies Act, 1862, *s.* 47.

A bank granted a letter of credit to a company on terms that the company should ship tea and forward bills of lading, invoices, and policy of insurance on the tea to the bank, and should also draw on *B. & Co.* bills, to be accepted by *B. & Co.* to an amount sufficient to cover the amount authorized by the letter of credit. *B. & Co.* guaranteed the performance by the company of these terms, "holding themselves responsible for the same." The company drew on the bank, and the bank accepted the bills, but owing to the failure of the bank after the dates when the bills were drawn and before they became due the company shipped no tea, and did not perform any of the terms agreed on. All the bills were eventually paid:—

Held, that the failure of the bank was no reason why the company should not have performed its part of the contract, and that *B. & Co.* were not relieved from their guarantee.

THIS was an application by the *Agra Bank*, as representing the *Agra and Masterman's Bank*, for leave to prove against the estate of *Barber & Co.* for a sum of £16,825 14*s.* 11*d.* Certain letters had passed between *Barber & Co.* and the bank early in December, 1865, which, being merely introductory, it is not necessary to set out. On the 26th of December, 1865, *Barber & Co.* wrote the following letter to the bank, on which chiefly the application was founded:—

"To the General Manager,
Agra and Masterman's Bank, Limited.

"136, *Leadenhall Street, London.*
"December 26, 1865.

"Sir,—In consideration of your granting the *Sylhet and Cachar Tea Company, Limited, Calcutta*, a letter of credit, No. 430, of the 22nd of December, 1865, for £20,000 (twenty thousand pounds) sterling to provide for the outlay of the new season's teas upon the following conditions, viz.:—

"They to draw upon your bank for the above amount at six months' sight to the extent of £6000 (six thousand pounds) ster-

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ling, in January, 1866, and thereafter, at the rate of £2000 (two thousand pounds) sterling per month, from February, 1866, to August, inclusive. They are to ship the whole produce of the season, estimated at 237,000 lbs. (two hundred and thirty-seven thousand pounds) as received from the factories, drawing upon us for the value of the same at six months' sight, accompanied by bills of lading, policy of insurance, and invoice of tea shipped. These bills, which we engage to accept, will be forwarded to you and be applicable to the payment of your engagement under the credit.

"We further undertake to pay you on or before the 31st of December, 1866, the full amount due to you under the credit, with interest and charges. We further undertake to return, duly signed by the *Sylhet and Cachar Tea Company, Limited,* the letter which you have handed to us for that purpose, and the terms of which we hereby confirm, holding ourselves responsible for the same. We enclose a cheque for £300 sterling, the amount of your commission on the credit at 1½ per cent.

"We are, yours faithfully,

"*James Barber & Co.*

"P.S.—It is understood that as the terms of the credit are higher than were at first told us and which we had already communicated to *Calcutta,* should the *Sylhet and Cachar Company* decline to confirm the arrangement and return the credit, the amount now paid for commission shall be refunded to us and the whole transaction be cancelled."

The letter of credit referred to in the preceding letter was in the following form:—

"In Duplicate.

"No. 430.

"*The Sylhet and Cachar Tea Company, Limited, Calcutta.*

"December 22, 1865.

"Gentlemen,—You are hereby authorized to draw upon this bank at six months' sight to the extent of £20,000 (twenty thousand pounds) sterling, in the following manner, viz., to the extent of £6000 (six thousand pounds) sterling in January, 1866, and thereafter, at the rate of £2000 (two thousand pounds) sterling

per mensem, from February, 1866, to August, inclusive. Such drafts I undertake duly to honour on presentation in order. Bills must specify that they are drawn under head office, credit No. 430, of 22nd December, 1865, and parties negotiating bills under it are requested to indorse particulars on the back hereof.

"I am, yours faithfully,

(Signed) "*M. Balfour*,
"General Manager.

(Signed) "*G. B. Dalby*,
"Chief Accountant."

In accordance with the agreement mentioned in the letter of *James Barber & Co.* of the 26th of December, 1865, the *Tea Company* sent the following letter to the bank:—

"To the General Manager
"*Agra and Masterman's Bank, Limited, London,*
"*The Sylhet and Cachar Tea Company,*
"*Limited, Calcutta.*

"February 2, 1866.

"Sir,—In consideration of your granting us a letter of credit for £20,000 (twenty thousand pounds) sterling, applied for or on our behalf by Messrs. *James Barber & Co.*, we undertake that this credit is to provide for the outlay for the new season's tea, and we further undertake and agree to ship (commencing in June or July, 1866,) the whole produce of the season, estimated at 237,000 lbs. (two hundred and thirty-seven thousand pounds), as it is received from the factories, and to draw upon Messrs. *James Barber & Co.*, of *London*, at six months' sight, for the value of same, forwarding to your bank bills, accompanied by bills of lading, policy of insurance, and invoice of tea shipped. The amount of such bills, when paid at maturity or under discount at the *Bank of England* minimum rate is to be applied in payment of the bank's acceptances under the credit it has granted. It is further understood that in the event of the bank coming under any cash advance in consequence of provision not being made for its acceptances at maturity either by Messrs. *James Barber & Co.* or ourselves, interest is to be charged on the amount of debit at the rate of 2 per cent. above the *Bank of England* minimum rate. We also engage to pay any balance that may appear to be due on the

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credit, with interest and charges, on or before the 31st December, 1866. We forward to you through Messrs. *James Barber & Co., London*, debentures of the *Sylhet and Cachar Tea Company, Limited*, to the extent of £25,000 (twenty-five thousand pounds) sterling, to be held by you as additional security, and bearing interest at 10 per cent. per annum.

"Seal affixed in the presence of
'*Hugh Fraser*, } Directors of the *Sylhet and*
"*T. J. Ferguson*, } *Cachar Tea Company.*

L.S.

"*Gordon Stuart & Co.*,
"Secretaries and *Calcutta* Managers *Sylhet*
"*and Cachar Tea Company.*"

In accordance with the letter of credit of the 22nd of December, 1865, eight bills of exchange were drawn, at the following dates and for the following amounts:—

Amount of Bills.	Date.	When payable.	When accepted.	Due Date.
£				
4000	31 Jan. 1866	6 months after sight	9 March 1866	12th Sept. 1866
2000	ditto	ditto	ditto	ditto
2000	7 Feb. 1866	ditto	ditto	ditto
2000	7 March 1866	ditto	6 April 1866	9 Oct. 1866
1000	6 April 1866	ditto	7 May 1866	10 Nov. 1866
1000	ditto	ditto	ditto	ditto
2000	7 May 1866	ditto	5 June 1866	8 Dec. 1866
2000	1 June, 1866	..	..	..

The bills were in forms similar to the following:—

"No. 3035. Exchange for £2000, *Calcutta*, 31st January, 1866.

"At six months after sight of this our first of exchange (second and third of same tenor and date being unpaid) pay to the order of ourselves the sum of two thousand pounds sterling, value received, and place the same, with or without advice, to account letter of credit, No. 430, of 22nd December, 1865.

"*Gordon Stuart & Co.*,
"Secretary and *Calcutta* Manager,
"*Sylhet and Cachar Tea Company, Limited.*

"To the *Agra and Masterman's Bank, Limited*,
"*Nicholas Lane, Lombard Street, London.*"

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The *Agra and Masterman's Bank* stopped payment in June, 1866, before any of the bills fell due, but the whole amount due on the bills was paid partly by a dividend from the *Agra and Masterman's Bank* and partly by the *Agra Bank*. The *Tea Company* failed to ship any tea, and forward the invoices of the same, together with the bills of lading and policies of insurance, or to draw upon *Barber & Co.*, in accordance with their agreement of the 2nd of February, 1866.

Mr. *Finlay Knight*, in support of the application.

Serjeant *Sargood*, in opposition:—

The bills were not drawn in accordance with the letter of credit; *Barber & Co.* were prejudiced by the failure of the bank; and where a person guaranteed does any act injurious to the surety the latter is discharged: *Watts* v. *Shuttleworth* (1). No money was owing on the bills of exchange on the 31st of December, 1866.

Mr. *Knight*, in reply:—

The failure of the bank was no ground for the *Tea Company* not performing their part of the agreement, the bank having performed their part: *Ex parte Tondeur* (2). The guarantee must be held to extend to moneys that might have become due after the 31st of December, 1866, since some of the bills could not, under any circumstances, have been payable until after that date. The bills were made and indorsed in the name of the *Tea Company* by a person acting under the authority of the company within the meaning of the 47th section of the *Companies Act*, 1862.

Feb. 16. Mr. BACON, C.J.:—

This is an application by the *Agra Bank, Limited*, who claim to be admitted as creditors for £16,000, under an inspectorship deed executed by the partners in the firm of *James Barber & Co.* The transactions out of which this claim arises commenced between the firm of *Barber & Co.* and the *Agra and Masterman's Bank* in the month of December, 1865.

(1) 29 L. J. (Ex.) 234. (2) Law Rep. 5 Eq. 160.

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Barber & Co. were the agents in *London* for the *Sylhet and Cachar Tea Company*, who were cultivators in *India* of land producing tea, which produce was to be and would have been in the ordinary course of trade shipped and sent to *England* for sale. For the purpose of this business the *Tea Company* desired to open a credit with the *Agra and Masterman's Bank*, and the firm of *Barber & Co.*, on behalf of the *Tea Company*, applied to the bank for such credit. The negotiations between the bank and *Barber & Co.* and the company are evidenced by the following documents:—

[His Honour here referred to the affidavits which contained the letters before set forth.]

Eight bills of exchange were drawn in *India* upon the faith of the letter of credit which had thus been granted, and were subscribed by *Gordon, Stuart & Co.*, secretary and *Calcutta* manager *Sylhet and Cachar Tea Company;* the amount of such bills being in the whole £16,000. The first of these bills was dated on the 31st of January, 1866, payable six months after sight, and having been accepted on the 9th of March, 1866, became due on the 12th of September in the same year. The other bills were drawn in the same form at different dates, and were all payable six months after sight. The last of the bills was dated the 1st of June, 1866, and each of the bills (excepting the last) was presented for acceptance, and accepted by the bank not later than the 5th of June, 1866. The last of the eight bills, dated the 1st of June, 1866, was never presented for acceptance, for the reason, as is stated, that it was bought in *Calcutta* by the liquidator of the *Agra and Masterman's Bank* on behalf of the bank, and therefore neither required or received any acceptance. On the 6th of June, 1866, the *Agra and Masterman's Bank* stopped payment. By an order of the Court of Chancery made on the 23rd of June, 1866, the voluntary winding-up of the *Agra and Masterman's Bank*, which had been resolved upon under the *Companies Act*, was ordered to be continued, subject to the supervision of the Court. In the month of December, 1866, by an agreement, which had been entered into between persons representing the *Agra and Masterman's Bank* of the one part, and the *Agra Bank, Limited*, of the other part, all the property and effects of the *Agra and Masterman's Bank* were transferred to, and are now vested in, the *Agra Bank, Limited*, and the agreement by

which the transaction was concluded has been confirmed by an order of the Court of Chancery. All the eight bills of exchange have been taken up, and are now in the hands of the *Agra Bank, Limited,* and it is in respect of these bills that the present claim is made. No one of the stipulations contained in the letter of the *Tea Company* of the 2nd of February, 1866, except the drawing the bills, has been performed by the *Tea Company.* They have not shipped any part of the produce mentioned in that letter, and, consequently, there have been neither bills of lading, policies of insurance, nor invoices of tea shipped; nor have any bills been drawn by the *Tea Company* upon *James Barber & Co.;* and it is by reason of the default of the *Tea Company,* the terms of whose undertaking the firm of *Barber & Co.* did, by their letter of the 26th of December, 1866, confirm, "holding themselves responsible for the same," that the *Agra Bank, Limited,* now claim to be creditors of the firm of *Barber & Co.* for the damage they have sustained by reason of the breach of that agreement which was so guaranteed by *Barber & Co.*

The facts I have stated appear in evidence, and, indeed, are not disputed as facts, but on the part of the inspectors of *Barber & Co.* several grounds of defence are alleged in opposition to the claim. First, it is insisted that if it were admitted that the bills in question were drawn by the *Tea Company* (which, however, is not admitted, as will be hereafter stated), yet that as *Barber & Co.* never had the benefit contemplated by them when they entered into the guarantee, and this, as contended, has arisen by means of the stoppage of the *Agra and Masterman's Bank,* the consideration for the guarantee has failed, and *Barber & Co.* are released from their engagement. Again, it is alleged that, according to the true construction of the letter of guarantee, the only onerous obligation upon *Barber & Co.* was that they would pay, on or before the 31st of December, 1866, the full amount which should then be due to the *Agra and Masterman's Bank,* and there being no evidence of how much has been paid in respect of the bills, to whom anything was paid, and when the same was paid, there is no foundation for saying that on the 31st of December, 1866, any sum whatever was due to the *Agra and Masterman's Bank.* Another ground of defence is, that the bills in question were not drawn in

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such a manner as is required by the *Companies Act*, 1862, sect. 47. That section provides that a bill of exchange shall be deemed to have been made on behalf of the company if made in the name of the company by any person acting under the authority of the company, or if made on behalf or on account of the company by any person acting under the authority of the company.

And in support of the first objection, the judgment of the Court of Exchequer in *Watts* v. *Shuttleworth* (1) was referred to, in which the Lord Chief Baron thus expressed himself: "The rule upon the subject seems to be, that where the person guaranteed does any act injurious to the surety or inconsistent with his right, or if he omits to do any act which his duty enjoins him to do and the omission proves injurious to the surety, the latter will be discharged." There can be no doubt of the perfect accuracy of the rule so expressed, but the question is, whether the facts of this case bring it within that rule? The obligation upon the *Agra and Masterman's Bank*, as expressed in the contract, is, that having granted the letter of credit, they will accept bills drawn upon them by the *Tea Company* in respect of that credit. This they appear to have performed strictly and literally; as a consequence they were bound to pay the bills when they arrived at maturity. That they have paid or satisfied them is a fact not in dispute, but there is no evidence as to how much they have paid or when they did pay. As I have said, all the bills, with the exception of the one which did not require acceptance, were accepted by the *Agra and Masterman's Bank* before their stoppage. By the very terms of the contract which *Barber & Co.* guaranteed the performance of, it became the duty of the *Tea Company* to place in their hands the season's produce of tea, and to send them moreover bills drawn upon and accepted by *Barber & Co.* If this had been done the means of meeting the bills when they arrived at maturity would have been, as it was contemplated they should be, in the hands of the bank or in the hands of *Barber & Co.*, and I can see no reason to believe that if this had been done the bills would not have been met at maturity. The fact of the stoppage and of the voluntary winding-up under the supervision of the Court presented no obstacle to the due payment of the bills. Upon this subject the decision of the

(1) 29 L. J. (Ex.) 234.

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Lord Chancellor, in the case of *Ex parte Tondeur* (1), seems to be directly applicable. Upon the authority of the cases there referred to His Lordship decided that the fact of a firm becoming insolvent, or even bankrupt, is not of itself any breach of a contract to accept bills drawn under a letter of credit similar to that which was here given by the same bank. In the case referred to there had been no acceptance of the bills, which made it different from, but if anything stronger than, the present case; the person to whom the letter of credit had been granted claimed to have damages assessed for the non-performance of the contract to accept. The application was refused by the Lord Chancellor, who held that the fact of the bank having stopped payment was no proof at all that they would not have accepted the bills if they had been presented, and he referred to a case in which he had authorized the liquidator of a company which was being wound up to accept bills drawn upon that company in order and for the very purpose of saving the estate from a claim for damages in respect of non-acceptance; and he said, "The only question is, have the bank refused to complete the contract, or disabled themselves from completing it?" And he answered that question by saying, "It does not appear that they have done either the one thing or the other." Here they have accepted the bills, and have paid for, and are holders of them, and have, as it seems to me, fully performed the contract they had entered into.

As well upon the authority of the Lord Chancellor in the case I have referred to as upon the principles of law which I take to be established by many other cases, I am of opinion that the grounds alleged form no answer to the claim for damages sustained by the *Agra Bank* by reason of the default of the *Tea Company*, and against which *Barber & Co.* guaranteed the bank. Nor can it be said, within the rule of *Watts* v. *Shuttleworth* (2), that the bank have done anything to prejudice the guarantor. All such liability as he has incurred arises, not from any default of the bank, but from the failure of the *Tea Company* to do that which they and the firm of *Barber & Co.* had promised should be done, and upon the faith of which promise the credit of the bank was procured.

(1) Law Rep. 5 Eq. 160. (2) 29 L. J. (Ex.) 234.

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The second ground of defence is rested upon what I conceive to be a misconstruction of the engagement to guarantee. The undertaking by *Barber & Co.* to pay on or before the 31st of December, 1866, the full amount which should be then due to the bank is one of the stipulations, but a separate stipulation, in the letter of guarantee. The previous stipulations of the guarantee provide for the shipment of the tea then growing, the actual value of which could not in December, 1865, be ascertained with certainty. It might, when shipped and sold, have produced less than the amount which had been drawn upon the faith of the letter of credit. The bills which *Barber & Co.* were to accept were to be only for the value of the tea shipped. Upon an account current, stated on these grounds, there would have been on the 31st of December, 1866, some balance due to the bank, even though the *Tea Company* had performed every other article of their engagement, and the amount of this balance *Barber & Co.* undertook to pay, but did not by that undertaking limit or qualify the general engagement they had entered into to become responsible for the performance by the *Tea Company* of all the other terms mentioned in the letter of guarantee. The objection as to the form of the bills under the 47th section of the *Companies Act*, 1862, is founded upon the statements contained in the affidavit of the same Mr. *Stuart*, whom I have before named. His statements, although they have the appearance of being positive, do not, as I conceive, establish the facts to prove which they are resorted to. They are mere pleading. They express the conclusion which the deponent has drawn, either from his construction of the statute or from some advice which he has received. When he says that the *Tea Company* did not by their agents or otherwise draw, and that the *Tea Company* was not liable on the said bills as the drawers thereof, and when he says that the *Tea Company* never did draw upon the bank for any part of the sum for which the letter of credit was given, I am induced to believe, and I am unwilling to believe otherwise, that he is stating his notions of a legal liability incurred rather than making a statement of facts; for, having regard to the letter of credit originally granted and the instructions which accompanied it, and to the fact that the *Tea Company*, in the letter under their seal, of the 2nd of February, adopt the transactions by which

the credit was to be granted to them, and to the date and number of the letter of credit, and that this document was transmitted to the bank attested by two of the directors, and by *Gordon Stuart & Co.*, secretary and *Calcutta* manager *Sylhet & Cachar Tea Company*, I cannot doubt that the bills in question were made on behalf or on account of the company by persons acting under the authority of the company, nor can I doubt that if the bank had refused acceptance of bills so drawn they would have become liable in damages to the *Tea Company*. The Respondents have not explained by evidence or in argument when and in what manner the bills were negotiated or dealt with in India, or what was received, and by whom, in the course of such negotiation or dealing. Upon the whole therefore, I am satisfied that the claimants are entitled to rank as creditors against the estate of *Barber & Co.* for the amount of damage the bank has sustained by reason of the non-performance of that contract by the *Tea Company*, which *Barber & Co.* guaranteed.

On the part of the bank it is alleged that they have paid £14,000, and they claim a sum of £825 14*s.* 11*d.* for interest, but it does not appear at what times they paid the sums composing that amount, nor what amount they in fact paid in respect of the bills. As to the £2000 bill bought in *Calcutta* they can only be damnified to the extent of what they paid, and the claim for interest must be a subject of calculation. All that I can do, therefore, at present is to declare that the claimants are entitled to be admitted as creditors against the estate of *Barber & Co.* under the inspectionship deed for the amount of such damage as they have sustained in respect of the non-fulfilment by the *Tea Company* of that contract, of which *Barber & Co.* guaranteed the full performance, and the amount of damages must be assessed under the 158th section of the *Companies Act*, 1862, either by reference to the Registrar or upon evidence to be adduced to the Court.

Solicitors for the Petitioner: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Respondent: Messrs. *Maynard & Co.*

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Bankruptcy Act, 1861, *ss.* 194, 197—*Deed of Assignment registered under s.* 194—*A Legal Proceeding pending in Bankruptcy or otherwise—Bankruptcy Repeal and Insolvent Court Act* (32 & 33 *Vict. c.* 83), 1869, *s.* 20.

2 Ch. App. Cas 604 613.

Section 197 of the *Bankruptcy Act*, 1861, gives the Court of Bankruptcy jurisdiction over deeds registered under sect. 194.

Pearson v. *Pearson* (1) considered.

The jurisdiction of the Court of Bankruptcy over a deed registered under sect. 194 is within the saving in sect. 20 of the *Bankruptcy Repeal and Insolvent Court Act*, 1869.

THIS was an appeal from a decision of Mr. *Daniel*, Q.C., the County Court Judge at *Bradford* in *Yorkshire*. The circumstances were as follows: On the 19th of August, 1869, the debtor, *William Brooksbank*, executed a deed of assignment to *Israel Rushworth* and *Joseph Smith* (the Respondents) as trustees, for the benefit of his creditors. The deed was registered on the 10th of September in the same year under sect. 194 of the *Bankruptcy Act*, 1861; and by it the debtor conveyed and assigned all his real and personal estate to the Respondents, to be distributed among all his creditors according to the law in bankruptcy, and in consideration of such conveyance and assignment the creditors, parties to the deed, released the debtor from all claims they had against him. Shortly before the execution of the deed the debtor transferred some of his property to the Appellant, *Mary Atkinson*, and her brother; and the Respondents, being desirous of obtaining information respecting this transfer, applied for summonses to compel the Appellant, who did not appear on the deed as a creditor, to attend for examination with respect to the transfer to her and her brother. The summonses were issued, and the Appellant on her appearance refused to be sworn until her expenses as a witness were paid; payment of such expenses was accordingly made, but the Appellant, through her solicitor, raised further objections, which were argued before the Judge; all these objections being overruled by the Judge, and

(1) Law Rep. 1 Ex. 308. 12 Jur. N.S. 589

the Appellant still refusing to be sworn, an order for commitment for contempt was made by the Judge, but the execution of it was suspended for a period sufficient to enable this appeal to be brought.

Mr. *Green* (of *Bradford*) for the Appellant:—

Any jurisdiction which, under the old law, the Bankruptcy Court might have had, is abolished by sect. 20 of the *Bankruptcy Repeal and Insolvent Court Act*, 1869, and a deed registered in *London* cannot be called "a legal proceeding pending in bankruptcy" so as to come within the saving clause in the same section. The deed being registered under sect. 194 of the *Bankruptcy Act*, 1861, it does not fall within the provisions of sect. 197, as that section applies only to deeds registered under sects. 192, 193: *Ex parte Morgan* (1); *Pearson* v. *Pearson* (2).

Mr. *Bagley*, for the Respondents, the trustees of the deed:—

Pearson v. *Pearson* merely decided that the right to sue for a *chose in action* remained in the debtor, although he had executed a deed of assignment, and registered it under sect. 194.

All deeds registered under sect. 194 are by the act of registration brought within the jurisdiction of the Court of Bankruptcy: *Symons* v. *George* (3).

Mr. BACON, C.J. (after stating the facts as above set out, continued):—

The first objection taken insists that the Court has no jurisdiction over the subject, all such authority as may at any previous time have existed being, it is said, extinguished by the 20th section of the *Bankruptcy Repeal Act*, 1869, whereby the several statutes previously in force were repealed. It would obviously be a subject of great regret if by any omission or inaccuracy in the Act of 1869 such a mischievous consequence should follow. The object and purport of the *Bankruptcy Act*, 1869, is to substitute a new law and new modes of procedure for those which had previously prevailed. It was no less its object and purport to continue (subject

(1) 1 D. J. & S. 288. (2) Law Rep. 1 Ex. 308.
(3) 3 H. & C. 68.

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to the provisions of the new statutes) all matters which had been begun under the old law, and to provide for their being carried into full completion by all such means as might be requisite for that purpose. Under the old law the 197th section of the *Bankruptcy Act*, 1861, gave to the Court in Bankruptcy full jurisdiction over the subject of trust deeds registered, and if that Act had remained unrepealed it is not open to doubt that the Court of the *Leeds* district, in which the debtor resided, would have been the Court in which all requisite proceedings must have been taken. By the effect of sect. 130, of the *Bankruptcy Act*, 1869, and the Orders made thereon, the jurisdiction of the *Leeds* Court is transferred to the County Court, whose order is the subject of this appeal, and by the General Rule 316 all the jurisdiction and authority which the district Bankruptcy Courts had respecting trust deeds, whether registered or in course of registration, at the end of December, 1869, is vested in the County Courts to which the general jurisdiction in bankruptcy is now transferred. Another objection which has been raised is, that the deed having been registered under the 194th section only, does not fall within the provisions of the 197th section—that the powers conferred upon the Court by the latter section can only be exercised with respect to deeds registered under the 192nd and 193rd sections, and consequently, that the Court at *Bradford* has exceeded its authority by ordering the examination of the person who, it is admitted, would be compellable to answer if the 197th section were applicable; and it is said that this contention is warranted and supported by the authority of cases referred to in the argument. Considering the great number of deeds registered under the *Bankruptcy Act*, 1861, and the variety and magnitude of the interests which they may involve, it would be very inconvenient that any doubt should remain upon this subject, and it may for this reason be worth while to examine the cases which have been decided on the point, and to consider what is the actual state of the law on this subject. One of the principal features of the *Bankruptcy Act*, 1861, is that division of it which relates to trust deeds. It is headed, "As to trust deeds for the benefit of creditors, composition and inspectorship deeds executed by a debtor," and consists of nine sections, which together comprise the whole of the law in bankruptcy to be administered on this par-

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ticular subject. The policy of the law seems to have been to facilitate arrangements between insolvent debtors and their creditors, and to afford means (other than the ordinary course of proceeding in bankruptcy) by which, under the circumstances prescribed, with the assent of a certain number of creditors, their several claims might be disposed of—a policy which had been recognised by previous statutes, in which less perfect machinery had been adopted, and which was laid aside in favour of the new regulations. To accomplish these objects with justice, with safety to the general interests, and with due regard to the established principles of law, a variety of provisions were indispensably necessary, and such of these as the Legislature thought it right to introduce are to be found in the division of the statute to which I have referred. But there are two leading principles which mainly govern the whole of these enactments. The one is that, in the cases where absent or non-assenting creditors are to be bound, sufficient publicity shall be given to the proposed arrangements by publication in the *London Gazette*, and that in every case all the creditors shall have convenient and accessible means of becoming acquainted with the details of the contract which has been made between the parties, and the transaction by which their rights and interests are in some instances bound and are affected in all. Thus, all such deeds as the clauses I have mentioned relate to must be registered, and all at the same place, by the same public officer, and within the same limited period of twenty-eight days, unless the Court should otherwise order; the difference between them being that as to one class of deeds the assent of a prescribed number and amount of creditors is required previous to the registration—while in the other no such assent is required. And the reason of this difference is obvious: in the first case the provisions of the deed became binding upon all the creditors, assenting and non-assenting; while in the other only those creditors are bound who have executed or assented to the deed.

It is to me perfectly clear that the very reason and cause of the registration which is thus imperatively required is, that the subject comprised within the deeds, in all its relations and for all its consequences, shall be, by the very fact of registration, brought within the competence of the Court of Bankruptcy; and I have been

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unable, after the best consideration I can bestow upon the subject, to suggest any other reason than this for the requirement of the statute that the deeds should be registered in the manner prescribed, or for the provision which is made applicable to every such deed without distinction or exception, that, unless the requisitions are complied with, the deed, as to which any such failure shall happen, shall not be receivable in evidence; that is, that it shall fail wholly to accomplish the purpose for which it has been made. Keeping these considerations in mind, and reading the division of the statute I have mentioned as a whole, which I conceive to be the only proper mode of construing this or any other statute, the 197th section is perfectly well adapted to its purpose, and is free from any question or ambiguity; for that section submits to the judicial determination of the Court in Bankruptcy every question that can arise under the deeds referred to, whatever may be their form or object; and by introducing the rules of law and the practice and procedure in bankruptcy, and applying them to the cases which may arise under deeds, protects every right which debtors or creditors may possess, and enforces them without any needless delay or expense.

By the argument which has been urged on behalf of the Appellant it is not disputed that, if the deed in question had been registered under the 192nd section, there would be no doubt that it would fall within the provision of the 197th section; but it is insisted, that inasmuch as the deed has been registered only under the 194th section, none of the powers conferred upon the Court by the 197th section can be exercised. I confess myself wholly unable to come to such a conclusion, or even to follow the train of reasoning by which it is arrived at.

Suppose a case in which every creditor had in the most formal manner assented to a deed, there would be no necessity for proving the requisite proportion in order to bind non-assenting creditors. And suppose such a deed duly registered under the 194th section, is that to be treated as a nullity? Are the creditors, who have executed it in reliance upon the good faith of the debtor, who may have forborne claims which they might have enforced, and who afterwards discover that their debtor has fraudulently possessed himself of and made away with the assets which were by the deed

devoted to the satisfaction of their debts—are they to be told that this statute, which requires the registration of the deed in order to give it validity, affords no protection?—its provisions, careful and elaborate as they are, do not extend so far as to do you justice; but, instead of putting in operation the swift and simple machinery of the 197th section, you must resort to the slow and expensive process of a suit in Chancery, or such other course of legal procedure as you may be advised? To expound the statute in any such manner would, in my opinion, be at once to misunderstand its plain meaning, and to deprive it of its usefulness as a general law.

But then it is said to have been decided that deeds, though registered under the 194th section, are not contemplated by or included in the provisions of the 197th section; and in support of this proposition the cases of *Ex parte Morgan* (1) and *Pearson* v. *Pearson* (2) are relied on. It is needless to say that the decisions which have been come to by the superior Courts are entitled to the utmost respect, not only because of the just eminence and the learning of the Judges by whom they have been pronounced, but also because they form the rules by which all other Courts are to be guided, and are, in fact, binding in all cases to which the principle of such decisions applies. But these considerations only make it the more necessary on all occasions to consider with the utmost care the exact principle which has been decided, and not, by the ingenious selection or by more or less artful criticism of the terms in which the learned Judges have expressed themselves, to draw conclusions which are not only foreign to the case in which those terms were employed, but which serve to mislead and render uncertain the rules of law which the Judges have laid down. It has been asserted that, in *Ex parte Morgan*, Lord *Westbury*, whose great learning and ability are entitled to the utmost deference at all times, and who, in expounding the *Bankruptcy Act*, 1861, spoke, besides, with a most intimate knowledge of the statute, of which he was himself the author, decided that deeds registered under the 194th section did not fall within the provisions of the 197th section. After the fullest consideration of that case, with which I am not now for the first time acquainted, I can come to

(1) 1 D. J. & S. 288. (2) Law Rep. 1 Ex. 308.

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no such conclusion. The question in that case was, whether or not a debtor who had executed a deed of arrangement with his creditors, but who (not having obtained the assents of creditors, which were necessary for its registration under the 192nd section) had registered it under the 194th section, had thereby deprived his non-assenting creditors of their ordinary rights, one of which is, to make bankrupt a debtor who has committed an act of bankruptcy. The bankrupt insisted that, having so registered, he was entitled to all the protection given by the 197th and 198th sections, in the same manner and to the same extent as if the deed had been registered under the 192nd section, and that his creditors, assenting and non-assenting, were bound by the deed. The Commissioner in the country adopted this view, and dismissed the Petition for adjudication, which had been presented by a dissenting creditor. From that decision the appeal was brought before the Lord Chancellor, who, in an elaborate judgment, decided that the protection which the bankrupt claimed was not extended to him by the deed so registered. That the protection so claimed by the bankrupt was the main subject for consideration is apparent from the terms of the judgment as reported. The Lord Chancellor says, after having pointed out the manner and effect of the registration required by the 192nd section: "It is plain, therefore, that the protection intended to be given to a deed under the 192nd section was a protection extending only to such deeds as should be duly registered in the manner and form required by the section." He then adverts to the other form of registration (the 194th section), which, he says, gives the power and imposes the obligation of registering any deed of composition or deed for the benefit of creditors which has not been registered under the 192nd section, and such deeds, he observes, are to be registered simply in the Court of Bankruptcy." He comments upon the penalty which ensues upon the neglect to observe the requirements of the statute, and upon the forms of registration in the two cases being different, whereby the consequences of the one form do not attach to the other, and says: "The consequence of an observance in every respect of the terms of the 192nd section is that the deed is binding on the minority of the creditors who do not execute or assent to it. No such consequence is attached to the registration under

the 194th section." And again, at p. 303, and a little further on, adverting to the fact of the registration being, in fact and in terms, made under the 194th section, he says: "It is impossible, therefore, that that deed can now be set up as having been duly registered under the 192nd section; and if it be not duly registered under that section it is not binding upon the creditors who are not parties to or do not assent to it." And the conclusion of the judgment deals with and decides the only point which was in question, viz., whether a creditor not bound by the deed so registered could make use of the deed itself as evidence of an act of bankruptcy. The words of this part of the judgment are remarkable and precise. The Lord Chancellor says: "The points which I decide for the purposes of the present motion are these: That this deed was not registered under the 192nd and 193rd sections; that it was intentionally, and by submission of the parties, registered under the 194th section; that validity, as against the use now attempted to be made of the deed, is not given by the 194th section; that the present petitioning creditors, therefore, are not bound by that deed, but may treat it as an act of bankruptcy, to which I think it amounts."

I find, therefore, in this judgment a plain decision upon precise grounds of the only question which was raised and was essential for the decision of the appeal. If it is said it goes further, and decides that none of the other salutary provisions of this division of the statute apply to deeds registered under the 194th section, I can only say that I am unable to discover any such meaning in it, and am tempted to ask for what conceivable reason the Legislature should require a deed to be registered in the Court of Bankruptcy if that Court was to lose all power and control over the proceedings which might arise after the registration? The protection to the debtor, which might have been acquired by a different mode of registration, was undoubtedly not acquired; but the rights of the creditors to invoke the aid of that Court in which the deed had been registered, and to whose jurisdiction the debtor had submitted himself, for the purpose of enforcing its provisions, and of giving it full effect by such means as are within the administration of the Court, are, in my judgment, abundantly clear. And it would surely be an unsatisfactory argument which should maintain

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that because all the powers given to the Court by the 197th section, with respect to deeds registered under the 192nd section need not be and cannot be exercised with respect to deeds registered under the 194th section; therefore, whatever reason may exist for their exercise, such of the same powers that may be justly and usefully put in force for the benefit of creditors are to be neutralised and made inoperative. Not referring only to the case *Ex parte Lawrence* (1), but to the well-established principles of the administration in bankruptcy, with which no one was more intimately conversant than Lord *Westbury*, I am satisfied that he would be greatly surprised if he should learn that the construction which has been suggested could be put upon his judgment in *In re Morgan*.

The case of *Pearson* v. *Pearson* (2) has also been cited in support of this appeal, and it cannot be denied that there are expressions attributed in the report to the learned Barons by whom that case was decided, which, if they were taken literally and without reference to the subject to which they were applied, would be in favour of the proposition contended for, viz., that a deed registered under sect. 194 is not within or affected by the provisions of sect. 197. But let us see what the case was in which this judgment was pronounced. An action was brought by a sole Plaintiff to recover money in which he declared that the Defendant was indebted to him. The Defendant pleaded, not that he was never indebted, but that the Plaintiff had conveyed all his estate and effects to trustees, and that he had therefore deprived himself of the right to enforce a just claim; and accordingly their Lordships adopted various ways of reading the statute. It is suggested that sect. 194 is parenthetical—that words might be interpolated in sect. 197, and that the registration prescribed by the previous sections is only such as is mentioned in sections 192 and 193. And all this for the purpose only of deciding that by a deed registered under sect. 194 a debtor's *chose in action* was not by virtue of section 197 so vested in the trustees as to make them the only persons competent to sue at common law for its recovery. I do not, however, understand their Lordships to have said, still less to have meant to say, that being parenthetical it was

(1) 1 D. J. & S. 307. (2) Law Rep. 1 Ex. 308.

to be disregarded and treated as if it had been omitted, or that the legal and equitable rights which the deeds purported to confer were extinguished, or that the trusts declared by it were not enforceable, or were not within the salutary powers of the Court in Bankruptcy, in which Court the deed is by the statute imperatively required to be registered. With most sincere deference, therefore, to the learned Judges by whom that case was decided, and not presuming to question their decision upon the subject to which it applies, I must say that it seems to me to be no authority for the proposition that, because a deed of assignment registered under sect. 194 does not enable the assignee to sue in his own name for a chose in action which was the property of the assignee before the deed, therefore the 197th section has no application to such a deed, and that all the power and jurisdiction which, by the 197th section is given to the Court of Bankruptcy over every such deed after registration, is wholly ousted. It would, in my judgment, be utterly unreasonable and unjust so to read the decision in *Pearson* v. *Pearson* (1). But even if it were possible to do so there would arise the utter impossibility of reconciling that decision with others pronounced in the same Court of Exchequer, and by some, if not all, of the same learned Judges. For in *Hodgson* v. *Wightman* (2), in an action to recover the amount of certain bills of exchange, the Defendants pleaded a composition deed executed by the Plaintiff and other creditors, which deed had not been registered, and the Plaintiff insisted at the trial that the deed was not receivable in evidence by reason of the prohibition contained in the 194th section. The objection being allowed at the trial, and a verdict being entered for Plaintiff, the Court was moved to enter the verdict for the Defendant. The judgment of the whole Court was delivered by Baron *Wilde*, who says (3), "We construe sect. 194 of the new *Bankruptcy Act* to apply to all deeds whatever which are, or profess to be, or are obviously on the face of them, intended to be deeds of arrangement or agreement between the debtor and the whole body of his creditors. It was clearly, in our opinion, intended to include not only deeds complying with and framed under the provisions of sect. 192, but all other deeds whereby a man may compound or arrange with the whole body

(1) Law Rep. 1 Ex. 308. (2) 1 H. & C. 810. (3) 1 H. & C. 818.

C. J. B. 1870 *Ex parte* ATKINSON *In re* BROOKSBANK.

of his creditors. We cannot read the several sections of the Act relating to deeds of arrangement, and avoid the conclusion that the scope of the new Act was to subject all such arrangements to the operation (to some extent at least) of the bankrupt laws, leaving it, however, open to the parties, by express provision in the deed to qualify and restrain the application of such laws."

And *Symons* v. *George* (1) is another case decided in the same Court and by the same Judges. The Plaintiff's rights depended upon a deed of composition registered under the 194th section although the requisites of the 192nd had not been complied with. The Court decided in effect that the deed being within sect. 194, sect. 197 subjects all such deeds when registered to the jurisdiction of the Court in Bankruptcy; and not to quote the judgment of the other Barons, these expressions of Mr. Baron *Bramwell* go direct to the point:—"from the language of the 194th and 197th sections it does seem that, although this deed is not binding on non-assenting creditors, its trusts may be administered under the provisions of the *Bankruptcy Act* with the assistance of the Court of Bankruptcy."

Now I have gone at greater length than I should otherwise have thought it necessary to do into the subject of this appeal, as well because I wish to express my entire concurrence with the learned Judge whose order is objected to, and who has exercised in pronouncing his decision the knowledge and discrimination and patience for which all who are acquainted with him know that he is eminent, but because the questions which have been raised may have a bearing upon other cases much more important than the present, and because the law upon deeds of arrangement and their consequences depending partly upon the law as it existed before the commencement of the present year, and partly upon the statutes now in operation, ought to be known and understood and preserved as free from doubt as possible.

The conclusion I have come to is, that the original contention on the part of the Appellant and the present appeal are wholly unsustainable. Some merely technical or formal objections are stated in the notice of motion; but as they have not been urged it is unnecessary that I should observe upon them further than to

(1) 3 H. & C. 68.

say that they are not entitled to serious consideration. The order made in the County Court remains in its full force. The only order, therefore, which it is proper to make on the appeal is, that this motion be dismissed with costs, to be paid by *George Atkinson* the husband and next friend of the Appellant, *Mary Atkinson*, to *Israel Rushworth* and *Joseph Smith* the Respondents, and that the sum of £20 which has been deposited with the Registrar be handed over to the said *Israel Rushworth* and *Joseph Smith*, and be received by them in part satisfaction of the costs hereby ordered to be paid.

Solicitor for the Appellant: Mr. *Green, Bradford.*

Solicitor for the Respondents: Mr. *Fluker*, for Mr. *Hutchinson, Bradford.*

END OF VOL. IX.

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ADMISSION OF ASSETS—*Will—Non-payment of Legacy—Bill by Legatee—Lapse of Time—Statute of Limitations—Trust.*] The payment of one legacy under a will by executors, not as such but out of their own moneys, is not an admission of assets for the payment of others. Where one of two executors who were also residuary legatees, had died, a payment by his representatives to the survivor out of the deceased executor's estate, in satisfaction of the surviving executor's claim as such residuary legatee:—*Held*, not to be an admission of assets for the payment of the other legacies under the will.—*J. W.*, by his will, gave his real and personal estate to trustees upon trust to convert the same and pay the income to *F. W.* for her life, and after her decease to pay the capital as she should appoint. *F. W.*, by her will, in exercise of her power, appointed the property to her executors (who were also the trustees of the will of *J. W.* and her own residuary legatees) upon trust to pay certain charitable legacies, including £1000 to the Hospital at *B.* This legacy was not paid, and thirty years after the decease of *F. W.* a bill was filed against the surviving executor and the representatives of one who had died, for its payment:—*Held*, that, as in the judgment of the Court there had been no admission of assets for the payment of the legacy, and no trust had been created, and no sum set apart for the payment of the legacy, the claim was barred by the *Statute of Limitations*. CADBURY *v.* SMITH - - - - - - 37

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AGREEMENT TO TAKE SHARES—*Company—Contributory — Collateral Agreement — Taking Shares to deceive the Public.*] *B.*, the local agent of an insurance company, being requested by the manager to take shares in order to induce other persons to become shareholders, offered to apply for 100 shares on condition that he should not be called upon to pay anything for the shares, but that all payments on the shares should be deducted out of his commission on shares sold by him, and upon being told by the manager of the company that he would "be allowed the privilege of paying them up as convenient," he sent in a formal application for 100 shares, which were duly allotted to him, and he was informed of the allotment, and was registered as the holder of the shares; but he never paid any money on application or allotment, or any calls. He signed a proxy paper under a protest that it should not cancel his agreement as to the non-payments on his shares, and attended two meetings of the company. His commission was insufficient to pay for the shares:—*Held*, that he had entered into an absolute contract to take the shares with a collateral agreement as to the effect of taking them, which did not prevent him being made a contributory:—*Held*, also, that having allowed his name to be registered as a shareholder to induce other persons to take shares, he was precluded from denying himself to be a contributory. *In re* GENERAL PROVIDENT ASSURANCE COMPANY. BRIDGER'S CASE - - - - - - - 74

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AMENDMENT, MATERIALITY OF — *Practice—Amendment of Bill—Cons. Ord. IX. r. 15—Maintenance—Liquidator prosecuting Contributory's Suit for Indemnity.*] In giving or refusing leave to amend a bill under Cons. Ord. IX. r. 15, the Court will not act upon the opinion of counsel, but will form its own judgment as to the materiality of the proposed amendment.—*Semble*, the liquidator of a company will not be allowed to prosecute a suit instituted by a contributory alleging himself to be a trustee of his shares for the Defendant, and claiming indemnity from him. HEMMING *v.* MADDICK - - - - - - 175

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BAPTIST DISSENTERS—*Deed of Settlement—Dismissal of Minister—Resolution at Meeting founded on Invalid Notice.*] By the deed of settlement of a Baptist chapel it was provided that the minister should be liable to be removed by the direction of the church declared at one meeting, and confirmed at a second meeting; that all directions of the church should be declared by a majority of communicants present at a meeting of which notice should have been given in the chapel during divine service on Sunday morning at least four days previously; also that whenever the church should have to consider the appointment or dismissal of a minister, the notice should expressly state the object of such meeting, and each of the directions to be declared at any such meeting should be reconsidered at a second meeting to be convened by public notice to be given in manner aforesaid, expressly stating the object thereof. —On Sunday, the 18th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday "for the purpose of bringing charges against, and considering the dismissal of," the then minister. No copy of the charges was sent to the minister. On the 24th of October the meeting was held, and a resolution was passed that in consequence of certain offences alleged to have been committed by the minister it was agreed that "he is not a fit and proper person to occupy the position of pastor, and that his office as pastor cease forthwith." On Sunday, the 25th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday "for the purpose of confirming and ratifying" the resolutions passed at the meeting of the 24th; and on the 31st of October the meeting was held, and a resolution passed that the minutes of the meeting of the 24th be "passed, confirmed, and ratified":—*Held*, that the notice of the 25th of October was invalid in law, because it did not specify the resolutions of the intended confirmation of which it gave notice; and hence that the resolution of the 31st of October, and the dismissal of the minister purported to have been thereby effected, were also invalid.—*Semble*, the resolution of the 24th of October was also invalid, on the ground that no copy of the charges to be brought against the minister was sent to him. Dean *v.* Bennett [625

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BUILDING SOCIETY—*Winding-up—Contributory—Deed—Estoppel—False Recital.*] *E.*, the surveyor of a benefit building society, at the request of the directors agreed to purchase land of the society on the understanding that he could immediately mortgage it to the trustees of the society for the full amount of the purchase-money. The land was conveyed to *E.*, and he executed, without reading it or knowing its contents, a deed prepared by the solicitor of the society mortgaging the land to the trustees, which he believed to be an ordinary mortgage for securing the purchase-money and interest. The deed in fact recited that *E.* was a member of the society, and had subscribed for a certain number of shares, and that the purchase-money had been advanced to him in respect of his shares, and it contained a covenant by *E.* to make payments on the shares according to the rules of the society. *E.* never applied for shares, and did not comply with any of the conditions prescribed by the rules for the admission of members, his name was not entered in the register of members, and the directors never called upon him to make any payments as a member. Two years after the date of the mortgage the society was ordered to be wound up:—*Held*, that the mortgage deed did not represent the real transaction, and that *E.* could not be made a contributory. *In re* Victoria Permanent Benefit Building, Investment, and Freehold Land Society. Empson's Case - - - 597

2. —— *Power to Borrow—Illegal Rule of Building Society—Loan to Building Society on Deposit.*] A rule of a benefit building society authorizing the borrowing of money by the society to an unlimited amount is illegal under the *Building Societies Act* (6 & 7 Will. 4, c. 32).—The rules of a benefit building society contained no express power of borrowing money, but provided that "persons merely joining the society to invest or deposit money" should not be entitled to vote at meetings of the society, nor be called upon to serve any office, and that "investors not in the building branch" might withdraw their deposits on giving a month's notice, if no other time was agreed upon when the deposits were made, and should be entitled to interest on all moneys which should have been in the hands of the society more than one month. The rules also provided that any member having received advances on his shares should be held as legally discharged from all connection with the society as soon as he had discharged all subscriptions and moneys due from him on account of his shares, according to the

BUILDING SOCIETY—*continued.*
rules.—The directors received money on deposit from persons who did not subscribe for shares in the society, and gave to each depositor a book called a "Member's Deposit Book," which contained printed rules purporting to be "Rules of the Deposit Branch," one of which provided that the general rules of the society should be binding on all persons who might make deposits.—The society was wound up by the Court, and the advanced shareholders, under an order in the winding up, redeemed their shares:—*Held*, that the rules of the society, if and so far as they authorized borrowing money on deposit, were illegal, as no limit was fixed to the amount which might be borrowed; and that the depositors were not entitled to have a call made upon the members for the repayment of their deposits:—*Held*, also, that the rules did not authorize the borrowing of money from persons who were not members of the society, and that the depositors were bound by the rules of the society, by which the advanced shareholders who had redeemed their shares were discharged from all connection with the society; and, consequently, on that ground also were not entitled to have a call made on the advanced shareholders for the repayment of their deposits. *In re* Victoria Permanent Benefit Building, Investment, and Freehold Land Society. Hill's Case. Jones' Case - - - - 605

BURIAL GROUND—*Liverpool Improvement Act—Reverter of Fee Simple—Notice to treat—Lands Clauses Act.*] By an Act of Will. 3, certain land belonging to the parish of *Liverpool* was set apart and dedicated to the use of a burial-ground, and by the sentence of consecration the corporation renounced all right to the land. In 1854 the ground was closed against burials by an Order in Council. In 1866 the corporation, being authorized to take a portion of the burial-ground under the *Liverpool Improvement Act*, served upon the rector, ordinary, and patron of the parish the usual notice to treat, and upon a reference to arbitration a sum of money was awarded for compensation. The corporation subsequently refused to pay, upon the ground that the fee simple of the land reverted to the corporation upon its being closed against burials, and the use for which it was dedicated having come to an end:—*Held*, that by the Act of Parliament, followed by the sentence of consecration, the land was dedicated for ever to the use of a burial-ground, and there was no reverter of the fee to the corporation; that, if necessary, the Court would presume a conveyance of the legal estate by the corporation:—*Held* also, that the notice to treat, and reference to arbitration, left the question of title open. Campbell *v.* Mayor and Corporation of Liverpool 579

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CONTEMPT OF COURT—*Motion to commit—Cons. Ord. xlii., Rule* 2.] Upon motion under Cons. Ord. xlii., rule 2, two Respondents were committed to prison for violent and abusive language used towards a person serving the process of the Court. Price *v.* Hutchison - - - - 534

CONTINGENT REMAINDER—*Old Will—Failure for want of Particular Estate—Residuary Bequest of "Estate and Effects" to Trustees "and their Heirs"—Reversion held to pass.*] Testator, by a will dated in 1832, gave and devised all his freehold estates to the use of his daughters (five), whom he named, equally, as tenants in common, for their several and respective lives, with remainder to trustees to preserve during the lives of the daughters "respectively," and from and after the decease of either of his said daughters, as to the one-fifth part or share of the daughter so dying, to the use of all and every the children of such daughter, born or to be born, who, being a son, or sons, had attained or should attain twenty-one, or being a daughter or daughters, should attain that age or be married, in equal shares, and to their several heirs and assigns for ever; but if there should be no such child who being a son should attain the said age, or being a daughter should attain that age or be married as aforesaid, then to the use of the others of his said four daughters for their respective lives, with remainder as to each share to such daughter's child or children.—After making certain specific and pecuniary bequests, the testator, as to "all the rest, residue, and remainder" of his "estate and effects," gave and bequeathed the same to the same trustees, "their heirs," executors, administrators, and assigns, upon trust to lay out and invest the same, or the produce thereof, as therein mentioned, as they should think fit, and hold his said residuary estate upon the same trusts as were thereinbefore declared with respect to his real estate, or as near thereto as the rules of law and equity would permit.—Testator died in 1834.—One of the daughters, who married in 1835, died in 1851, leaving an only child, a son, *W.*, who did not attain twenty-one until 1860.—In a suit of *Holmes* v. *Prescott* (12 W. R. 636), upon the same will, it had been incidentally held by the Lord Chancellor, when Vice-Chancellor *Wood*, that the limitation of each daughter's share in the freehold estates to her child and children being contingent, the remainder to *W.* failed for want of a particular estate to support it:—*Held*, that the limitation over of the same share, if there should be no such child, being also a contingent remainder, also failed, and that the reversion in such share, after the death of the daughter, passed under the residuary clause in the same will, and did not descend to the heir. Perceval *v.* Perceval - - - 386

CONTRACT—Novation of 306, 316, 643, 694
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CONTRIBUTORY—Agreement to take shares 74
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—— Bankrupt shareholder - - - 653
See Bankrupt Shareholder.
—— Delay in registration - - - 589
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—— Forfeiture of shares - - - 107
See Forfeiture of Shares.
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—— Misrepresentation in prospectus—Laches [263, 266, n.
See Misrepresentation in Prospectus. 1, 2.
—— Mortgagee of building society - - 597
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—— Power of directors to refuse to register 223,
See Transfer of Shares. 2, 3. [225, n.
—— Scrip certificate—Liability to take shares
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—— Suit for indemnity—Liquidator - 175
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COPYHOLDS—*Seizure quousque—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27).] The bill stated that certain copyhold lands were in the possession of the Plaintiff's grandfather, who was entitled in fee simple by descent, but had never been admitted tenant on the Court rolls, and that prior to 1831, when the grandfather died, the lord of the manor, after the usual proclamations, had duly seized the lands *quousque*, no person having claimed to be admitted. The Plaintiff alleged that he was the customary heir, and prayed that the lord might be decreed to admit him as tenant on the Court rolls, upon payment of the fines due:—*Held*, upon demurrer, that this was in effect a bill for the recovery of land, and that the Plaintiff, or those under whom he claimed, having been out of possession for more than twenty years, the *Statute of Limitations* (3 & 4 Will. 4, c. 27) was a bar to the Plaintiff's claim.—Demurrer allowed. Walters *v.* Webb - - - - - 83
—— Encroachments by lord - - 241
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—— Equity of redemption in legal assets - 443
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COPYRIGHT—Newspaper - - - 324
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COSTS—Bankruptcy of client—Taxation by assignee - - - - 72
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—— Bankrupt trustee - - - 340
See Trustees' Costs.
—— Between solicitor and client—Administration commenced in Chambers - 443
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—— Directors—Concealment of facts - 480
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—— Lands Clauses Act—Payment of dividends—Petition - - - - 668
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—— Surveyor's charges - - - 69
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—— Trustee Relief Act—Income and *corpus* 374
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—— Uncertificated solicitor - - - 63
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COSTS UNDER LANDS CLAUSES ACT—*Purchase-money paid into Court—Insolvent Company—Petition for Payment of Costs.*] Where glebe lands have been taken by a railway company, and the purchase-money paid into Court under sect. 69 of the *Lands Clauses Act*, and an order had been made on the petition of the rector for its investment, and for payment of the dividends to him for his life, and for payment by the company of his costs,—the company having since become insolvent, leaving part of the costs unpaid:—*Held*, that part of the fund in Court might be sold for payment to the solicitors of the rector of the amount of costs remaining due. *In re* Glebe Lands of Great Yeldham - - - 68

COUNTY COURT—Equity jurisdiction 103, 169
See County Court Jurisdiction. 1, 2.

COUNTY COURT JURISDICTION—*Equitable Jurisdiction—In what Court Proceedings to be taken—Transfer of Plaint to Court of Chancery—County Courts Acts*, 1865, *ss.* 1, 3, 9, 10; *and* 1867, *s.* 1.] Where a plaint had been filed in a County Court against five Defendants, of whom one only, who was in the Plaintiff's interest, had a residence in the County Court district, all the others being resident in other districts, the plaint was ordered to be transferred to the Court of Chancery. Baker *v.* Wait - - - - - 103

2. —— *County Court—Redemption Suit—Jurisdiction—County Courts Equity Act* (28 & 29 *Vict. c.* 99).] Appeal against a decree of a County Court for redemption dismissed with costs, although the right to redeem was resisted on the ground of a sale by the mortgagee under a power which the Court (the alleged purchaser being made a party by amendment) held to be an invalid sale. Under the *County Courts Act* (*Equity*), 28 & 29 Vict. c. 99, the County Courts have jurisdiction in a redemption suit, though the right to redeem is disputed. Powell *v.* Roberts - - 169

COVENANT—Against building - - 636
See Covenant not to build.
—— Against building public-house - 26, 674
See Covenant not to keep Public-house. 1, 2.
—— Against particular manufacture - 345
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—— To pay premiums on life assurance - 155
See Policy of Life Assurance. 1.
—— To settle share of joint tenancy—Severance
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—— To work mines efficiently - - 538
See Covenant to work Mines.
—— Voluntary, to release power - - 191
See Release of Power.

COVENANT NOT TO BUILD — *Garden Wall — Vinery—Injunction—Damage—Parties.*] Plaintiff, in 1866, took a conveyance of a piece of land bounded by a road, from a vendor, who cove-

COVENANT NOT TO BUILD—*continued.*
nanted that "no buildings," except dwelling-houses, not to cost less than £200 each, to front with the road, should be erected on the opposite side of the road to the Plaintiff's land. Defendant, in 1869, agreed to purchase from the same vendor the land on the opposite side of the road to the Plaintiff's land; he also agreed to make a permanent fence around the land so agreed to be purchased, either by railing or walling, from four to seven feet high; and he further agreed to enter into a covenant with the vendor similar to that which had been entered into by the Plaintiff.—Afterwards the Defendant, having thrown the land so agreed to be purchased into pleasure ground, built a garden wall alongside the road, 8 ft. 6 in. high; and in one part 11 ft. high; behind which part he also erected a vinery, with a roof leaning against the wall:—*Held*, that the building of the wall to the height of 8 ft. 6 in. was not a breach of the covenant:—*Held*, further, that the building of the wall to the height of 11 ft., and the erection of the vinery, were breaches of the covenant.—Mandatory injunction refused and damages awarded.—The conveyance to the Defendant had not been executed:—*Held*, nevertheless, that the vendor, who had been made a Defendant, was not a necessary party; and Plaintiff ordered to pay his costs. Bowes *v* Law 636

COVENANT NOT TO KEEP PUBLIC-HOUSE—*Beer not consumed on the Premises.*] A covenant not to use a house as "a beerhouse" is not broken by the sale, under a licence, of beer by retail to be consumed off the premises. London and North Western Railway Company *v.* Garnett - 26

2. —— *Grantor and Grantee—Covenant against the Use of the "Trade of a Seller by Retail of Wine or Spirits"—Sale by Grocer of Wine and Spirits in Bottle.*] A grantee in fee of a piece of building land covenanted by a separate deed with the grantor that the piece of land should not for the space of twenty years be used "as a site for any hotel, tavern, public-house, or beerhouse," nor should "the trade or calling of an hotel or tavern keeper, publican or beer-shop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors," be "used, exercised, or carried on, at or upon" the same:—*Held*, that the sale of wine and spirits in bottle by a grocer in the course of his trade was not such a breach of the above covenant as the Court of Chancery would interfere with.—*Feilden* v. *Slater* (Law Rep. 7 Eq. 523) distinguished. Jones *v.* Bone - - - - - 674

COVENANT TO WORK MINES—*Coal Mines—Covenant to work uninterruptedly, efficiently, and regularly—Minimum Rent—Power to compel increased working—Remedy at Law—Directions in Chambers.*] The plaintiffs granted a lease of a coal mine to the Defendants, reserving a minimum rent of £720, to be increased to £1000 in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual or most improved practice. The lessees paid the minimum rent, but only raised a small quantity of coal by working through an adjoining mine without sinking pits on the Plaintiff's property. The Plaintiffs being desirous

COVENANT TO WORK MINES—*continued.*
of enforcing a larger amount of working, whereby an increased rent would be payable, filed a bill for specific performance of the covenant in the lease:—*Held*, that there was no obligation upon the Defendants to sink pits, although that might be the most efficient mode of working; and that, so long as the minimum rent was paid, the Defendants could not be compelled to work the mine at all; that the lessees had committed no breach of contract; but if they had done so, the remedy was at law and not in equity; and that this Court could not, by a reference to Chambers, give effect to the covenant by directions as to the management of a coal mine.—Bill dismissed with costs. Wheatley *v.* Westminster Brymbo Coal Company - - - - - - - 538

CREDITORS' DEED—Costs of trustee who has executed - - - - 340
See Trustees' Costs.

—— Execution by plaintiff pending suit—Dismissal for want of prosecution - 35
See Dismissal for want of Prosecution.

—— Receiver—Inspectors - - - 456
See Receiver. 3.

CY-PRÈS—*Will—Charity.*] Testatrix made several bequests to charitable institutions, and, amongst others, to the *C. P. A. Society* in *England*, and to the *C. P. A. Society* in *Ireland*. There was no such society as the *C. P. A. Society* in *Ireland*, but the *S. A. Society* for *Ireland*, to whom a bequest had been made, was founded for similar objects and with rules almost identical with those of the *C. P. A. Society* in *England*:—*Held* (the Attorney-General not objecting), that the bequest might be paid to the *S. A. Society* for *Ireland*. *In re* Maguire - - - - 632

DAYS OF GRACE—Life assurance—Proof in winding-up - - - - 703
See Policy of Life Assurance. 2.

DEATH BEFORE DATE OF WILL - 395
See Death before Testator.

DEATH BEFORE TENANT FOR LIFE - 378
See Survivorship.

DEATH BEFORE TESTATOR—*Will—Construction—Gift to A. and a Class for their Lives—Gift over on Death of Survivor to the Children of A. and the Class—Children of Members of Class predeceasing Testator not excluded—Children of a Member of Class predeceasing the Date of the Will excluded.*] Testator devised real estate to trustees and their heirs, upon trust to permit his brother-in-law, *H. M.*, and all and every his brothers and sisters, to enjoy the rents and profits for their respective own use in equal shares for their lives, with benefit of survivorship where any of them should die without leaving children; but where any of them should die leaving children, upon trust to let such children have their parents' share, until the longest liver of his said brother-in-law, brothers, and sisters should die; and so soon as they should all be dead, upon trust to convey the said shares equally among the children of his said brother-in-law, brothers and sisters, in equal shares by families and not by heads; but if any of them should die without having a child or

DEATH BEFORE TESTATOR—*continued.*
children, then upon trust to convey the shares of such as should so die unto the survivors in equal shares.—Before the date of the will, one brother of the testator had died, leaving children. After the date of the will, and before the death of the testator, *H. M.* and a brother and a sister had died, leaving children:—*Held*, that the children of *H. M.* and of the brother and sister who were living at the date of the will were entitled to shares in the estate; but not the children of the brother who was dead at the date of the will. Habergham *v.* Ridehalgh - - - 395

DEBT—Novation of - - 306, 316, 643, 694
See Novation of Contract. 1—4.

—— Wife's debt contracted before marriage 555
See Separate Estate. 2.

DEDICATION OF LAND FOR BURIALS - 579
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DEFAULTING RECEIVER - - 172, 456
See Receiver. 2, 3.

DEFAULTING TRUSTEE—DEBTORS' ACT, 1869, s. 4 - - - - - 228
See Sequestration.

DEFECTIVE APPOINTMENT—Election - 301
See Election. 1.

DEPOSIT—Loan by building society—Illegal rule - - - - - 605
See Building Society. 2.

DEPOSIT FOR SAFE CUSTODY—*Railway Company—Stock Certificates—Fraudulent Sale by Depositee—Forged Transfer—Registration of Shares—Rights of Owner.*] Plaintiff, the owner of railway shares in two companies, took certificates from the companies, for which he gave receipts. In so doing he gave his address, in one instance, at the office of a banking company, in the other, at a club. He deposited the certificates with the manager of the bank for safe custody. The manager fraudulently sold the shares, and forged the name of the Plaintiff to transfer deeds of the shares. The companies wrote to the Plaintiff informing him of the transfers; and receiving in one instance no answer, and in the other an answer purporting to come from the Plaintiff, but in reality forged by the manager, registered the shares.—On bill against one of the companies and the purchaser, praying that the purchaser might be decreed to deliver up the certificate to the Plaintiff, that the company might be decreed to cancel the alleged transfer, and the entry of it in their books, to deliver to the Plaintiff a stock certificate, and to pay the dividend then due, and all future dividends:—*Held*, that the Plaintiff was entitled to the relief prayed, but without prejudice to any question at law or in equity between the co-Defendants:—*Held*, further, that the negligence or mistaken confidence of the Plaintiff disentitled him to costs against either Defendant. Johnston *v.* Renton. Johnston *v.* Parsey 181

DESERTION BY HUSBAND—Advances to wife for necessaries - - - 151
See Necessaries for Wife.

DEVISE—Residuary—Intention not to pass mortgaged estate - - - 563
See General Devise of Real Estate.

DIRECTORS—Delay in registering shares - 589
See Transfer of Shares. 4.

—— Misconduct—Repayment - - 480
See Misconduct of Directors.

—— Power to refuse to register transfer 223, 225, n.
See Transfer of Shares. 2, 3.

DISMISSAL FOR WANT OF PROSECUTION—*Practice—Creditors' Deed under Bankruptcy Act*, 1861.] A registered deed of assignment in trust for creditors, executed by the Plaintiff pending the suit, has the effect of an adjudication in bankruptcy against the Plaintiff, and deprives the Defendant of his right to move to dismiss for want of prosecution: the proper form of motion being, that the trustee of the deed be ordered to take proper supplemental proceedings within a given time, and in default that the bill stand dismissed. *Pickering* v. *Cape Town Railway Company* (Law Rep. 7 Eq. 224) distinguished. Price *v.* Rickards - 35

DISMISSAL OF MINISTER - - - 625
See Baptist Dissenters.

DISSENTERS—Baptists—Dismissal of minister
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DISTRESS—Offices of company—Winding-up 370
See Distress after Winding-up Order.

—— Power of—Annuity charged on land—Receiver - - - - - 22
See Receiver. 1.

DISTRESS AFTER WINDING-UP ORDER—*Company—Companies Act*, 1862, *s.* 163.] Where offices had been let to a company which was ordered to be wound up by the Court, a distress was subsequently put in for rent by the lessors, under which the office furniture was seized:—*Held*, that as possession of the offices had not, in the opinion of the Court, been retained for the purpose of the company's business, the distress was illegal under s. 163 of the *Companies Act*, 1862, and that the lessors were only entitled to prove for the amount due to them. *In re* Progress Assurance Company. *Ex parte* Liverpool Exchange Company - - - - 370

DIVESTING CLAUSE—Death before tenant for life - - - - - 378
See Survivorship.

DIVIDENDS—Order for payment of - 668
See Payment out of Court.

DOCUMENTS—Production of - 132, 666
See Production of Documents. 1, 2.

DOWER—*Lands Clauses Act* (8 *Vict. c.* 18)—*Purchase-money in Court—Dower—Payment out of Part of Fund to Dowress.*] Where land belonging to an infant, subject to his mother's right of dower, was taken by a railway company, and the purchase-money, as determined by two valuers, was paid into Court under the *Lands Clauses Act*:—*Held*, that the dowress was entitled to have the value of her right of dower, as determined by the valuers, paid to her out of the fund in Court. *In re* Hall's Estate - - - - 179

EASEMENT—Alteration in—Light and air 438
See Light and Air.

EAST INDIA STOCK—Investment in 274, 343
See Investment of Money in Court. 2, 3.

ELDEST SON — *Settlement — Construction — "Younger Sons" — Vesting — Class, when ascertained.*] By a marriage settlement the real estate

ELDEST SON—*continued.*

of the husband was settled (subject to a life interest in the husband) on the first and other sons of the marriage successively in tail male; and, by a separate deed in which the settlement of the husband's estate was recited, the real estate of the wife was settled (subject to a life interest in her) to the use of all and every the son and sons (other than an eldest or only son) and daughter and daughters of the marriage in equal shares as tenants in common in tail; and it was provided that if any such son or daughter should die and there should be failure of issue of his or her body, or in case any such younger son or sons should become an eldest or only son before he or they should attain the age of twenty-one years, then the share of such son or daughter, as well original as accruing, should go to the survivor, or survivors, or others of the younger sons or daughters (if more than one) in equal shares, as tenants in common in tail; and if there should be only one such son or daughter, to him or her in tail:—*Held*, that a younger son who, after attaining twenty-one, became in the lifetime of his mother an eldest son, was not entitled to a share of the wife's estate. *In re* Bayley's Settlement - - - 491

ELECTION—*Will—Defective Appointment—Residuary Appointment of Non-appointed Part.*] The donee of an exclusive power to appoint to her children, appointed to trustees upon trust during the life of her son *J.* to apply at discretion the whole or any part of the income for the benefit of *J.* or his children, and subject thereto upon trust for *J.'s* children as *J.* should appoint, and in default for her daughter *A.*, and after giving legacies appointed her property not thereinbefore appointed to *A.*:—*Held*, that the whole was well appointed to *A.*, and that no case of election could arise. Wallinger *v.* Wallinger - - 301

2. —— *Will—Revocation in excess of Power.*] A lady on her marriage appointed by deed-poll £3000 to trustees, the interest to be paid to her husband for life, and after his decease, the capital to be divided between her nephews and nieces; and the deed contained a power to revoke the trusts subsequent to the life estate. By her will, after marriage, she revoked all the trusts of the deed, and gave £1000 to her husband and £2000 to the Plaintiff:—*Held*, that the testatrix having revoked all the trusts of the deed while the power only extended to the remainder, the husband was put to his election. Coutts *v.* Acworth - - - - 519

"ENTITLED"—*Will—Real Estate—Tenant in Tail in Remainder.*] Testator devised real estate to and to the use of trustees and their heirs in trust for his nephew *W.*, son of his brother *E.*, and his other sons in tail male, remainder to the first and other sons of his (testator's) brother *A.*; remainder to the first and other sons of his (testator's) brother *S.*; remainder to the second and other sons of his (testator's) brother *E.* in tail male; with remainder over. He empowered his trustees during the minority of any infant tenants in tail, "or other persons for the time being entitled" under the trusts, to grant leases; and also during the minority of any tenant for life, in tail, or in fee, "entitled to the present possession" of the estates, to manage the estates, and accumulate the surplus towards maintenance and education.

"ENTITLED"—*continued.*

Testator then bequeathed his residuary personalty to the trustees upon trust to pay and transfer the same unto and equally amongst all his nephews and nieces living at his decease, except *W.*, "or other the person or persons entitled" to the estates.—At the time of testator's death *W.* was dead, an infant, and never married; *A.* and *S.* were living, and the second son of *E.* was living, an infant. Testator left four nephews and nieces, besides the second son of *E.*—*S.* had since died, not having been married; the second son of *E.* had attained twenty-one. *A.* was living, aged sixty-eight, and not married:—*Held*, that the second son of *E.*, being tenant in tail expectant on the failure of sons of his uncle *A.*, was not "entitled" to the real estates within the meaning of the will; and was not excluded from participating in the personal estate. Umbers *v.* Jaggard - - 200

EQUITY OF REDEMPTION—Copyholds—Legal assets - - - - 443
See Legal and Equitable Assets.

"ESTATE AND EFFECTS"—Gift of, in will—Reversion in realty - - - 386
* *See* Contingent Remainder.

ESTOPPEL—Mortgage deed—False recitals—Building society - - - 597
See Building Society. 1.

EVIDENCE—Birth—Date of entry in register
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—— Marriage—Mutilation of register - 571
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—— Survey by Crown—Boundaries and customs of manor - - - - 241
See Right of Common.

EXECUTOR—Admission of assets by - 37
See Admission of Assets.

—— Beneficial gift to - - - 204
See Executors taking Beneficially.

EXECUTORS TAKING BENEFICIALLY—*Will—Bequest to Executors "in consideration of" paying the Income to the Wife for Life—Intestacy as to Reversion—No beneficial Gift to Executors.*] Testator bequeathed all his property to two persons whom he appointed executors (one being a neighbouring farmer, the other a surgeon called in during his last illness to make the will) "in and for the consideration of" paying over the rents and profits to his wife for life:—*Held*, that the executors did not take beneficially, but that the estate, subject to the widow's life interest, was undisposed of. Bird *v.* Harris - - - 204

"FAMILY OR NEXT OF KIN"—*Will—Power to a Spinster to appoint amongst "her own Family or Next of Kin"—Appointment to a Grand-niece—Valid Appointment.*] A power to an unmarried woman to appoint a fund amongst "her own family or next of kin":—*Held*, not to be confined to her statutory next of kin, but to be capable of extension to any relative. Snow *v.* Teed - 622

FAMILY PLATE—Settlement of - - 358
See Resulting Trust.

FORFEITURE—Policy of life assurance—Non-payment of premiums - - 703
See Policy of Life Assurance. 2.

FORFEITURE—*continued.*
—— Scrip certificate - - - 236
See Scripholder.

FORFEITURE CLAUSE — *Bankruptcy — Annulment—Forfeiture—Practice—Amendment at Hearing.*] A clause of forfeiture of an annuity on bankruptcy or alienation does not operate where the bankruptcy is annulled before the first payment becomes due.—Subject to the life interest of *X.* therein, property was devised to trustees, upon trust thereout to pay an annuity of £100 to *A.* (husband of the testatrix) during his life, with a declaration that if *A.* should become bankrupt, or should assign, charge, or incumber, or suffer any act whereby the same or any part thereof would, if belonging absolutely to him, become vested in any other person or persons, then the said annuity should not be payable, or should cease to be payable, in the same manner as if *A.* were dead.—*X.* survived the testatrix, and died on the 4th of April, 1868.—In January, 1868, *A.* was adjudicated bankrupt on his own petition, and on the 21st of July, 1868, an order was made on his own application, with the consent of his creditors, annulling the adjudication in bankruptcy:—*Held*, that as the bankruptcy was annulled before the first payment under the annuity fell due (April 4, 1869), the clause of forfeiture did not operate. Trappes *v.* Meredith - - - 229

FORFEITURE OF SHARES — *Company.*] The proprietors of a mine in 1835 agreed to form themselves into a company, upon the plan that the mining property should be divided into 12,000 shares, of which 5500 should be retained by themselves, and the remaining 6500 allotted to the public at £40 a share, the allotment moneys being retained by the proprietors. The deed of settlement provided that if default should be made in payment of the instalments of the £40, the shareholder should cease to be a proprietor, and the share should be forfeited. Powers were reserved to increase the capital by (amongst other means) augmenting the amount of the shares, and of altering the existing laws, rules, and regulations of the company. In 1836 another deed of settlement was executed, the effect of which was to make the shares transferable by simple delivery of the certificates.—In 1866, it was resolved at a general meeting held under the deed of settlement, that the capital should be increased by augmenting the 12,000 shares from £40 to £50, to be paid by instalments, upon non-payment of which the share was to be forfeited; that within a certain period the shareholders were to bring in their certificates, with the name, residence, and description of the holders, to be registered; and in default that the shares should be forfeited for the benefit of the company. It was also resolved that the company should be registered as a limited company under the Act of 1862.—Copies of the resolutions were sent to all the shareholders whose addresses were known; but the holders of 2405 of the 12,000 shares did not send in their certificates to be registered.—The holders of the 9595 shares who sent in their certificates had been effectually forfeited; and that they were not liable to be placed on the list of contributories. *In re* Cobre Copper Mine Company. Kelk's Case. Count Pahlen's Case - 107

FRAUD—Charges of, not sustained - 276
See Solicitor, Negligence of.
—— Mutilation of marriage register - 571
See Limitations, Statute of.

FUNDS HELD FOR PUBLIC SERVICE — *Parliamentary Vote—Trust Fund—Jurisdiction—Pleading—Allegation of Trust—Demurrer.*] The funds voted by Parliament for the public service are not trust funds in the hands of the Secretaries of State who receive them from the Treasury; and the Court of Chancery has no jurisdiction to take any account of the application of such funds.—A general allegation that a Defendant holds a fund upon trust for the Plaintiff will not protect a bill from demurrer for want of equity. For that purpose the bill must allege facts shewing that the relation of trustee and *cestui que trust* exists between Plaintiff and Defendant. Grenville-Murray *v.* Earl of Clarendon - - - - 11

GARDEN WALL—Covenant against building 636
See Covenant against building.

GENERAL DEVISE OF REAL ESTATE — *Legal Estate in Mortgage—Intention not to pass Legal Estate.*] A testatrix devised and bequeathed all the residue of her property, of whatever description, which she had power to dispose of by will, as follows:—one moiety to be equally divided between her two daughters, and the other moiety she gave to a trustee to be paid in equal shares to her two sons at twenty-five, the shares of children dying under age to go to the survivors, and the trustee to have power to vary the securities and to apply part of the income for the maintenance and education of the children. The testatrix was mortgagee in fee of an estate which was subsequently sold under a power in the mortgage deed, and the purchaser required that the residuary devisees should join in the conveyance:—*Held*, that the legal estate in the mortgaged property passed to the heir-at-law of the mortgagee. Martin *v.* Laverton - - - - - 563

GENERAL ORDER, 1st FEB., 1861 - 274, 343
See Investment of Money in Court. 2, 3.

GIFT BY IMPLICATION—*Will—Construction—Mis-recital.*] A testator being entitled to a policy of assurance for £500 on the joint lives of himself and his wife, bequeathed all his personal estate, "save and except the sum of £500 payable at my death, under a policy of insurance, to my wife, and to which she is absolutely entitled under the said policy," to trustees, upon trust for his wife for life, and for his children after her death:—*Held*, that the £500 payable under the policy was given, by implication, to the widow absolutely by the will. Hall *v.* Lietch - - - 376
—— Settlement of family plate - - 358
See Resulting Trust.

GIFT TO ISSUE "ON THEIR ATTAINING TWENTY-ONE" — *Will—Construction—Intermediate Gift of Income "to be applied in or towards" their Maintenance and Education.*] Testatrix gave a share of residuary personal estate to such of her

GIFT TO ISSUE "ON THEIR ATTAINING TWENTY-ONE"—*continued.*
four grandchildren (naming them) as should be living at the death of *M. A. H.*, and directed that in case any of her said four grandchildren should die in the lifetime of *M. A. H.* leaving issue, the share or shares of such of them so dying should be assigned and transferred to such issue respectively, in equal shares and proportions, "on their attaining the age of twenty-one years, and the dividends and proceeds thereof in the meantime to be applied in or towards their maintenance and education."—One of the grandchildren having died in the lifetime of *M. A. H.*, leaving issue, of whom several died under twenty-one:—*Held*, that the interests of such of the issue of the grandchild as died under twenty-one did not vest at the death of their parent, but that the share vested in such of the issue only as attained twenty-one. *In re* Ashmore's Trusts - - - - 99

GIFT, ORIGINAL OR SUBSTITUTIONAL—*Will—Construction—Gift of Personalty to Children or their Heirs.*] A testator gave his residuary personal estate to trustees upon trust for his wife during her life, and at her death for his children "or their heirs":—*Held*, that this was a substitutional gift to the next of kin, according to the statute, of a child dying before the period of distribution. Finlason *v.* Tatlock - - 258

HEIRS—Gift of personalty to - - 258
See Gift, Original or Substitutional.

HIGHWAY—Obstruction—Width of way 418
See Obstruction to Highway.

HOUSE OR OTHER BUILDING—Lands Clauses Act, s. 92 - - - 432
See Part of House.

HUSBAND AND WIFE—Affidavit of no settlement - - - - 423
See Lapsed Share.

—— Compromise of suit by married woman 58
See Compromise by Married Woman.

—— Necessaries—Advances to wife - 151
See Necessaries for Wife.

—— Separate estate - - - 333, 555
See Separate Estate. 1, 2.

—— Separate estate of wife—Bills of Sale Act
See Order and Disposition. [510

—— Settlement by Court of Chancery - 404
See Settlement by Court of Chancery.

—— Settlement by infant—Confirmation 468
See Infant's Settlement.

—— Wife's equity to settlement - - 404
See Settlement by Court of Chancery.

ILLEGALITY — Building society — Borrowing money - - - - 605
See Building Society. 2.

—— Trust—Failure of illegal purpose - 475
See Illegal Trust.

ILLEGAL TRUST—*Recovery of Trust Property by Settlor—Bankruptcy—Arrangement—Composition—Bankruptcy Act*, 1861, *s.* 110.] Although, where a trust has been created for an illegal purpose, the Court will not in general interfere, it will do so where the illegal purpose fails to take effect.—Where, therefore, the Plaintiff, being in pecuniary difficulties, assigned certain leasehold property to

ILLEGAL TRUST—*continued.*
a trustee with the view of defeating his creditors, and two and a half years afterwards was adjudicated bankrupt, but obtained the sanction of the creditors, under s. 110 of the *Bankruptcy Act*, 1861, to an arrangement by which his estate and effects were re-vested in him, he covenanting to prosecute a suit for the recovery of the assigned property, and to pay a composition of 2*s.* 6*d.* in the pound to his creditors in case such suit had a successful termination:—*Held*, that the Plaintiff was entitled to have the property re-conveyed to him by the Defendant, who claimed by assignment from the original trustee.—*Semble*, an arrangement by which the estate of a bankrupt is re-vested in him in consideration of a money composition is valid under s. 110 of the *Bankruptcy Act*, 1861. Symes *v.* Hughes. Symes *v.* Hughes - - 475

INCLOSURE ACT—Width of highway - 418
See Obstruction to Highway.

INCOME—Separate—Married woman - 333
See Separate Estate. 1.

INCOME AND CORPUS—Costs under Trustee Relief Act - - - - 374
See Trustee Relief Act.

INDORSEMENT ON ORDER—Service without—Irregularity - - - 137
See Taxation. 4.

INFANT—Settlement by—Confirmation - 468
See Infant's Settlement.

—— Shareholder—Acquiescence - - 363
See Infant Transferee.

INFANT TRANSFEREE—*Contributory—Acquiescence—Transfer to Trustee.*] A person to whom shares in a company had been transferred while he was an infant, became adult nearly two years before the company commenced to be wound up; and during that time took no steps to repudiate the shares though proceedings had been taken to enforce calls:—*Held*, that he was a contributory.—A shareholder transferred shares standing in his own name into the name of an infant as trustee for himself, nearly three years before the company commenced to be wound up. The company, though they had means of knowing the nature of the transaction, registered the transfer, and made no objection before the winding-up:—*Held*, that the trustee was a contributory, and not the *cestui que trust*, and that neither the trustee nor the official liquidator was entitled to have the register altered. *In re* Norwegian Charcoal Iron Company. Mitchell's Case - - - - - 363

INFANT'S SETTLEMENT—*Reversionary Interest—Married Woman—Voidable Deed—Confirmation.*] A female infant, upon her marriage, executed a settlement of two funds of personalty to which she was entitled in reversion expectant on the determination of certain life interests. She survived her husband, and while she was his widow one of the funds fell into possession, and was, by her direction, paid to the trustees of the settlement, to be held upon the trusts thereof. Before the second fund fell into possession she had become a lunatic:—*Held*, that, in the absence of any evidence to the contrary, she must be taken to have confirmed the settlement *in toto*, and that the second fund, when it fell into possession, was subject to the trusts thereof. Davies *v.* Davies 468

INFRINGEMENT OF PATENT—*Sale in England of a Material made abroad by the Patent Process.*] The importation and sale in *England* of articles manufactured abroad according to the specification of an English patent, is an infringement. Elmslie *v.* Boursier - - - - 217

INJUNCTION—Covenant against building 636
See Covenant not to build.

—— Light and air—Alteration in easement 438
See Light and Air.

—— Piracy—Newspaper - - - 324
See Newspaper.

—— Waste - - - - - 683
See Waste.

INSPECTION OF ACCOUNTS—*Company—Voluntary Liquidation.*] A clause in the articles of association of a company, directing that the books of account (thereby directed to be kept) should, subject to any reasonable restrictions as to the time and manner of inspecting the same that might be imposed by the company in general meeting, be open to the inspection of the shareholders during the hours of business, is no longer applicable when the company is under voluntary liquidation. *In re* Yorkshire Fibre Company - - 650

INSPECTION OF DOCUMENTS—Accountant—Solicitor's clerk - - - 132
See Production of Documents. 1.

INSPECTORS—Creditors' deed—Liability for receiver - - - - 456
See Receiver. 3.

INSURANCE COMPANY—Transfer of business [306, 316, 643, 694
See Novation of Contract. 1—4.

—— Winding-up—Test of solvency - 122
See Winding-up Petition. 3.

INTEREST—Purchase-money - - 56
See Appropriation of Purchase-money.

INVESTMENT OF MONEY IN COURT—*Lands Clauses Act* (8 *Vict. c.* 18), *s.* 70—*Purchase-money—Interim Investment on Real Security.*] The Court will sanction the interim investment on real security of purchase-money paid into Court under the *Lands Clauses Act*. *In re* William Smith's Estate - - - - - - 178

2. —— *Parliamentary Deposits Act* (9 *Vict. c.* 20)—*Investment of Deposit—Gen. Ord. of Feb.* 1, 1861—30 & 31 *Vict. c.* 132.] A sum of money deposited in the *Bank of England* pursuant to the *Parliamentary Deposits Act* (9 Vict. c. 20) is not "Cash under the control of the Court" within the meaning of the Order of the 1st of February, 1861, and can only be invested in Consolidated or Reduced Bank Annuities, or in Government securities, as provided by sect. 4 of the Act.—An application for an order for investment of such a fund in Bank Stock or New East India Stock (in which trustees are authorized to invest by the Act 30 & 31 Vict. c. 132) refused. *Ex parte* Great Northern Railway Company - - - - 274

3. —— *Direction in special Act to invest in Consols or £3 per Cent. Reduced Annuities*—23 & 24 *Vict. c.* 38, *s.* 10—*Gen. Ord.* 1*st Feb.* 1861, *r.* 1.] The Court may, under 23 & 24 Vict. c. 38, s. 10, and the General Order of the 1st of February, 1861, rule 1, order the investment in *East India* Stock of a fund paid into Court under the provisions of a special Act anterior to 23 & 24 Vict. c. 38, although such special Act directs the investment to be in Consols or £3 per Cent. Reduced Bank Annuities. *In re* Wilkinson's Estate - - - 343

IRREGULARITY—Notice of meeting - 625
See Baptist Dissenters.

JOINT TENANCY—*Joint Tenancy in Reversion of Real Estate—Marriage Settlement—Recital and Covenant—Severance of Joint Tenancy.*] By a marriage settlement to which the intended husband and wife were parties, after reciting that upon treaty for the marriage it had been agreed that the property, "as well real as personal," to which the intended wife "is entitled, and may be entitled," should be held upon certain trusts, and that it had been "further agreed" that the intended husband should enter into a covenant "for settling the last-mentioned real and personal property for the purposes last aforesaid," the indenture witnessed that the intended husband covenanted with the trustees that "all the estate and effects, both real and personal, of which" the intended wife "is now seised and possessed, or of which she shall hereafter become seised or possessed," should be settled.—At the date of the settlement the intended wife and her two sisters were joint tenants in fee of real estate in reversion expectant on the death without issue of their brother.—Similar settlements were made on the marriages of the other two sisters. All three sisters and their husbands died in the lifetime of their brother, who died without issue. No settlements were ever made in fulfilment of the covenants:—*Held*, that the joint tenancy had been severed by the settlements. Caldwell *v.* Fellowes - - - - - - 410

JOINTURE—Succession duty—Death of jointress
See Succession Duty. [212

JURISDICTION—County Court—Equity jurisdiction - - - - 103, 169
See County Court Jurisdiction. 1, 2.

—— Fund held for public service—Allegation of trust - - - - - 11
See Funds held for Public Service.

LACHES—Assignees in bankruptcy—Shares of bankrupt - - - - 653
See Bankrupt Shareholder.

—— Misrepresentation in prospectus 263, 266, n.
See Misrepresentation in Prospectus. 1, 2.

—— Registering transfer of shares - - 589
See Transfer of Shares. 4.

LANDLORD AND TENANT—Company—Distress after winding-up - - - 370
See Distress after Winding-up.

LANDS CLAUSES ACT - - - 179
See Dower.

—— s. 69 - - - - - - 68
See Costs under Lands Clauses Act.

—— s. 70 - - - - - 178
See Investment of Money in Court. 1.

—— ss. 70, 80 - - - - 663
See Payment out of Court.

—— s. 80 - - - - - - 69
See Taxation. 2.

LANDS CLAUSES ACT—*continued.*

—— s. 92—Part of house—Nursery garden 432
See Part of House.

LAPSE—Appointed fund - - - 423
See Lapsed Share.

LAPSED SHARE—*Feme Covert—General Power of Appointment by Will—Appointment of Fund to Legatees—Residuary Gift of Personalty—Wills Act* (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 27—*Lapse of Part of the Legacy—Destination of the lapsed Portion—Affidavit of no Settlement by the Wife alone.*] Under a marriage settlement, personalty, the property of the wife, was assigned to trustees upon trust for the separate use of the wife for life, then for the husband for life, and in default, which happened, of children of the marriage, if the husband should survive the wife, which also happened, as to one-third of the *corpus* for the husband absolutely, and as to two-thirds, as the wife should, notwithstanding coverture, appoint, and in default of appointment for the persons who would at the death of the survivor be the next of kin of the wife. Afterwards a decree for a divorce *à mensâ et thoro* was pronounced, and the husband, by deed, for valuable consideration from the wife, assigned to the trustees of the settlement all his share and interest whatsoever, whether in his marital right or otherwise, in the property comprised in the settlement upon trust, as the wife should by deed or will appoint, and after her death, in default of appointment, for her next of kin as if she had died without a husband.—The wife, by will, in exercise of her power, appointed the fund to two of the three trustees of the settlement, and directed that they (whom she appointed executors) should stand possessed of the same upon trust to sell, and out of the proceeds stand possessed of a sum of £1000, and also of her residue, after the decease of a tenant for life, upon trust for her two nieces in equal shares absolutely.—She also appointed, gave, and bequeathed "all my plate, linen, books, pictures, jewels, household furniture, and stores, all of which are my separate property, or have arisen from my separate savings, together with any other separate property and savings which I may have at my death," to a legatee absolutely.—One of the nieces died in her lifetime:—*Held*, that the share of the funds which lapsed did not pass by the residuary clause under the 27th section of the *Wills Act*:—*Held*, further, that the share of the funds which lapsed passed to the next of kin of the testatrix, and not to the persons interested in default of appointment under the settlements.—Testatrix, by will, bequeathed certain chattels to her niece, *Maria Dyer*, then unmarried, absolutely. *Maria Dyer* married a husband named *Wilkinson*, and the testatrix, by a codicil, revoked the bequest contained in her will, and made another disposition of the same property in favour of her two nieces. The second niece died, and the testatrix made another codicil, in which she expressed a wish that "in the event of the name of *Maria Wilkinson* having been erased from my will, it be reinstated as previously there placed":—*Held*, that the codicil was inoperative.—Where a husband is residing permanently abroad, *Semble*, the Court will act upon an affidavit of no settlement by the wife alone. Wilkinson *v.* Schneider - - - - - 423

LEASE—Mines—Minimum rent—Covenant to work mines - - - - 538
See Covenant to work Mines.

LEGACY—Payment by executor—Admission of assets - - - - 37
See Admission of Assets.

—— Two children held to include three - 507
See Mistake of Testator. 2.

LEGAL AND EQUITABLE ASSETS—*Administration—3 & 4 Will. 4, c. 104—Equity of Redemption in Copyholds—Insufficient Estate—Costs of Plaintiff as between Solicitor and Client.*] In the case of a testator who died before the 1st of January, 1870, the equity of redemption in copyholds is to be administered as legal assets under 3 & 4 Will. 4, c. 104.—Costs of a plaintiff, a residuary legatee, in a suit for administering an insufficient estate, which he had commenced in Chambers, allowed as between solicitor and client. *In re* Burrell. Burrell *v.* Smith - 443

LEGAL ESTATE—Mortgage—General devise 563
See General Devise of Real Estate.

LIABILITY—Mortgagor, for mortgage debt paid into Court of Exchequer - - 297
See Payment of Mortgage Debt.

—— Wife's separate estate—Debt contracted before marriage - - - 555
See Separate Estate. 2.

LIEN—Solicitor, for costs - - - - 1
See Solicitor's Lien.

LIFE ASSURANCE—Policy effected by creditor
See Policy of Life Assurance. 1. [155

—— Proof under winding-up - 703, 706
See Policy of Life Assurance. 2, 3.

—— Transfer to another office 306, 316, 643, 694
See Novation of Contract. 1—4.

LIGHT AND AIR—*Obstruction—Clearances by Adjoining Owners.*] The easement of a Plaintiff to have his light and air unobstructed by the Defendant's newly-erected buildings is not lost or diminished by the circumstance that, by means of clearances effected in the neighbourhood by other parties shortly before the Defendant's alterations, the Plaintiff acquired more light than the Defendant's buildings could subtract. Dyers' Company *v.* King - - - - - 438

LIMITATIONS, STATUTE OF (3 *&* 4 *Will.* 4, *c.* 27), *s.* 26—*Concealed Fraud—Reasonable Diligence.*] The Plaintiff sued to recover property to which his predecessor, as he alleged, became entitled in the year 1769, and insisted that a register book containing a certificate of marriage, forming the principal link in his title, had been fraudulently mutilated in order to prevent him or his ancestors from obtaining evidence of the marriage:—*Held*, upon demurrer, that, by reasonable diligence, evidence of the marriage might have been ascertained within twenty years after the alleged fraud had been committed; and that the Plaintiff had not brought his case within the 26th section of the *Statute of Limitations*.—*Semble*, that an ejectment bill may properly be filed in this Court under the 26th section upon the ground of fraud. Chetham *v.* Hoare - - - 571

—— Legacy - - - - - 37
See Admission of Assets.

LIMITATIONS, STATUTE OF—*continued.*
—— Seizure *quousque* - - - 83
See Copyholds.

LIQUIDATOR—Prosecution of suit by contributory for indemnity - - - 175
See Amendment, Materiality of.
—— Undertaking to pay Petitioner's debt 447
See Winding-up Petition. 5.

LIVERPOOL IMPROVEMENT ACT — Burial-ground - - - - 579
See Burial-ground.

MAINTENANCE—Intermediate gift of - 99
See Gift to Issue "on their attaining Twenty-one."

MANAGER OF COMPANY—Termination of engagement by winding-up - - 149
See Salary.

MANOR—Suit on behalf of freeholders and copyholders - - - - 241
See Right of Common.

MARRIAGE—Consideration of—Children by subsequent marriage - - - 44
See Voluntary Settlement. 1.

MINES—Covenant to work efficiently - 538
See Covenant to work Mines.

MINISTER—Dismissal of - - - 625
See Baptist Dissenters.

MISCONDUCT OF DIRECTORS—*Company—Payments to Directors—Non-disclosure of Facts—Costs.*] *L.* agreed with the directors of Bank *A.* to negotiate an amalgamation of the businesses of Banks *A.* and *B.* upon the terms that if the negotiations were successful he should be paid a commission. An amalgamation was accordingly effected, upon which the manager, chairman, and vice-chairman of Bank *B.* became directors of Bank *A.* After they had become such directors, *L's* commission was paid by the manager of Bank *B.* out of its assets; and part of such commission was handed over by *L.* to, or applied for the benefit of, the manager, chairman, and vice-chairman of Bank *B.* in pursuance of an agreement to that effect previously made between them. A suit was instituted by Bank *A.* against the manager, chairman, and vice-chairman of Bank *B.* and the other directors of Bank *A.* for the purpose of recovering the amount of the commission:—*Held*, that the manager, chairman, and vice-chairman of Bank *B.* were liable to make good the sums received by them or applied for their benefit, subject to deduction therefrom in the case of the manager of the amount of compensation properly payable to him in respect of his loss of office; and that the other directors of Bank *A.* having been ignorant of the manner in which the commission was applied, and having acted for the benefit of the company, were not liable to make good anything; but having concealed from the shareholders the fact that a commission had been paid, they were disallowed their costs. General Exchange Bank *v.* Horner 480

MIS-DESCRIPTION OF LEGACY—Legacy called annuity - - - - 401
See Mistake of Testator. 1.

MISREPRESENTATION—Prospectus of company [263, 266, n.
See Misrepresentation in Prospectus. 1, 2.

MISREPRESENTATION—*continued.*
—— Transfer of shares - - 223, 225, n.
See Transfer of Shares. 2, 3.

MISREPRESENTATION IN PROSPECTUS—*Company — Winding-up — Contributory — Laches.*] Where a suit has been instituted by a shareholder to be relieved from his shares on the ground of misrepresentations in the prospectus of the company, another shareholder similarly situated is barred by laches from obtaining the like relief unless after notice of the misrepresentations he promptly informs the company of his intention to claim the benefit of the decision in the first suit.—*Pawle's Case* (Law Rep. 4 Ch. 497) distinguished. *In re* Estates Investment Company. Ashley's Case - - - - - - 263

2. —— *Laches.*] A shareholder who had been induced to take shares by misrepresentations in the prospectus, had a report of the company in March, 1865, from which he might have discovered the misrepresentations. In April he received a dividend, and paid a call. In July he became acquainted with the fact that another shareholder had been released from his liabilities on the ground of the misrepresentations, and he then took proceedings himself:—*Held*, that he was barred by his laches. Scholey *v.* Central Railway Company of Venezuela - 266, n.

MISTAKE—Recital in will - - - 376
See Gift by Implication.
—— Will—"Annuity" for "legacy" - 401
See Mistake of Testator. 1.
—— Will—Number of children - - 507
See Mistake of Testator. 2.

MISTAKE OF TESTATOR—*Will—Contingent Annuity—Legacy to Annuitant—Codicil—Mis-description of "Legacy" as "Annuity"—Erroneous Words rejected, and Gift upheld.*] Testatrix by will gave to *A. B.* an annuity of £40, contingent on a certain event. She then gave *A. B.* a legacy of £30. By a codicil testatrix said, "And I increase the immediate annuity of £30 left by my will to" *A. B.*, "to an annuity of £50":—*Held*, that *A. B.* took an annuity of £50 in addition to the contingent annuity of £40. Ives *v.* Dodgson - 401

2. —— *Will—Construction—Gift to each of the two Children of A. held to include a third Child—Costs against Residuary Legatee.*] Gift of £250 to each of the two children of *S.* He had three children:—*Held*, that the three children were each entitled to £250.—The executors, in ignorance that there were three children, paid the eldest, who was of age, her legacy, and set apart £250 for the second, and also paid all the debts and other legacies, and paid over the residue to the residuary legatee. On a bill by the two younger children against the executors and residuary legatee, the Court declared Plaintiffs entitled, and ordered the legacies and the costs, including those of the executors, to be paid by the residuary legatee. Spencer *v.* Ward - - - - - 507

MORTGAGE—Building society—False recital 597
See Building Society. 1.
—— Call of company - - - 721
See Mortgage of Call.
—— Legal estate—General devise - - 563
See General Devise of Real Estate.

MORTGAGE—*continued.*

—— Payment by mortgagor into Court of Exchequer - - - - - 297
See Payment of Mortgage Debt.

MORTGAGE OF CALL—*Company—Call.*] Upon the understanding that a call should at once be made and the proceeds deposited to await the maturity of two promissory notes to be renewed in pursuance of the arrangement, a bank, the creditors of a company for money properly borrowed, agreed to renew the notes of the company. The call was accordingly made, and the notes subsequently renewed:—*Held*, that the mortgage to the bank being of the proceeds of a call already determined upon, was distinguishable from an attempt to pledge future calls, and was consequently valid. *In re* Sankey Brook Coal Company - - - - - - - 721

MOTION TO COMMIT - - - 534
See Contempt of Court.

MOTION TO VARY CERTIFICATE—*Practice—Time—Consolidated Orders xxxv, r.* 52.] The Chief Clerk's certificate having been filed on the 12th of January, notice that the Court would be moved on the 31st of January to vary the certificate was served on the 19th:—*Held*, that service of the notice of motion was not sufficient under Cons. Ord. xxxv., r. 52, to arrest the certificate; and that the motion, not having been made until after the eight days from filing the certificate had expired, was consequently not in time. Henshaw *v.* Angell - - - - - - 451

MUTUAL ASSURANCE COMPANY - 694
See Novation of Contract. 4.

NECESSARIES FOR WIFE——*Husband and Wife—Desertion—Advances to Wife—Right to recover from the Husband.*] A person who has advanced money to a married woman deserted by her husband for the purpose of, and which has been actually applied towards, her support, is entitled in equity, though not at law, to recover such sums from the husband. Deare *v.* Soutten - 151

NEWSPAPER—*Copyright—Registration—5 & 6 Vict. c.* 45—*Interlocutory Injunction.*] A newspaper not being within the *Copyright Act* (5 & 6 Vict. c. 45), requires no registration under that Act, but the proprietor of a newspaper has, without registration, such a property in all its contents as will entitle him to sue in respect of a piracy.—Where the proprietor of a newspaper sought to restrain the piracy of "a list of hounds," the Court was of opinion that, although the piracy might be established, the list was liable to such frequent changes, and a correct list was so easily obtained, that it was not a case for an interlocutory injunction. Cox *v.* Land and Water Journal Company - - - - - - - 324

NEXT FRIEND—Married woman—Useless suit—Costs - - - - - - 333
See Separate Estate. 1.

NEXT OF KIN—"Family or next of kin" 622
See "Family or Next of Kin."

NOTICE—Agreement by separate deed—Restraint of trade - - - - - 678
See Restraint of Trade. 2.

—— Vendor and purchaser—Tenant's interest in property sold - - - - 51
See Notice of Tenant's Interest.

NOTICE OF MOTION—Varying certificate - 451
See Motion to vary Certificate.

NOTICE OF TENANT'S INTEREST—*Specific Performance—Compensation.*] Where a vendor contracted to sell certain property which the purchaser knew to be in occupation of a tenant, and it was afterwards discovered by the purchaser that the tenant had a lease:—*Held*, that the purchaser was affected with notice of the lease, and was not entitled to specific performance with compensation. James *v.* Lichfield - - 51

NOTICE TO TREAT—Lands Clauses Act—Title
See Burial-ground. [579

NOVATION OF CONTRACT—*Policy of Assurance—Annuity—Transfer of Business by one Life Assurance Office to another—Payment to new Office of Premiums on Policy effected with old Office—Receipt from new Office of Annuity granted by old Office.*] The holder of a life policy of assurance, having notice that the *N.* assurance office, with which the policy was effected, had transferred its business and assets to the *A.* assurance office, and had ceased to carry on business, paid the premiums on his policy to the *A.* office for thirteen years, and upon the dropping of the life sent in a claim upon the policy to the *A.* office:—*Held*, that there had been complete novation of the contract, and that the *N.* office was released from liability on the policy.—The holder of an annuity granted by the *N.* office, having notice of the transfer, received his annuity for thirteen years from the *A.* office:—*Held*, on the authority of *In re Family Endowment Society* (Law Rep. 5 Ch. 118), that there had been no novation of the contract, and that the *N.* office remained liable for the annuity. *In re* National Provincial Life Assurance Society - - - - - - 306

2. —— *Policy of Assurance—Transfer of Business by one Life Assurance Office to another—Indorsement on Policy—Payment of Premium to new Office.*] *B.*, the holder of a life policy of assurance in the *I. Assurance Society*, having received from the chairman of the society a letter informing him that the society had been dissolved, and had transferred its business and assets to the *H. Insurance Company*, and that he was entitled to have his policy exchanged for a new one, or an indorsement made thereon on the part of the *H. Company* "guaranteeing its due fulfilment," sent his policy to the office of the *H. Company*, who returned it to him with an indorsement charging the funds and property of the *H. Company* with the payment of the sum assured on payment of the future premiums to the *H. Company*. *B.* paid one premium to the *H. Company*, and on the dropping of the life sent in his claim to the *H. Company*:—*Held*, that *B.* had not merely accepted the liability of the *H. Company* as a guarantee for the payment of the policy, but that there had been complete novation of the contract, and that the *I. Society* was released from liability on the policy. *In re* International Life Assurance Society, and Hercules Insurance Company. *Ex parte* Blood - - - - - - - 316

3. —— *Winding-up—Transfer of Business—Novation—Practice—Service.*] In 1862 the business and assets of life assurance company *C.* were transferred to company *B.*, and in 1865 the business and assets of company *B.* were transferred to

NOVATION OF CONTRACT—*continued.*
company *A.*, which was ordered to be wound up in 1869. Premiums continued to be paid until 1865 at the original office of *C.*, and the form of the receipts given indicated an incorporation or union between *B.* and *C.*, rather than a transfer of business, and the dissolution of *C.* From 1865 the premiums were paid at the office of *A.*, and the receipts were headed as of that company:—*Held*, upon the evidence afforded by the premium receipts (in the absence of any evidence of notice of the transfer from *C.* to *B.*, or assent thereto by the creditor), that there had been no novation so as to preclude the representatives of a policy-holder in *C.* from enforcing their claim upon the policy by a winding-up order:—*Held*, also, that no novation having been established as to the first transaction between *C.* and *B.*, the creditors of *C.* remained unaffected by any subsequent transactions between *B.* and *A.* to which *C.* was no party, even though notice of such transactions was brought home to them.—A Petition to wind up a company which has transferred its business and been dissolved eight years ago, must be served upon some of the members, officers, or servants of the company, and the Court refused to make any order upon a Petition which had only been served at the place where the company carried on business eight years before. *In re* Manchester and London Life Assurance and Loan Association - - 643

4. —— *Mutual Assurance Company—Transfer of Business—Policy-holder.*] By the deed of settlement, dated in 1847, of the *M.* society, it was provided that the subscription capital of £100,000 in 2000 shares of £50 each should be subject to be paid off as therein provided; and in the meantime was to be deemed a guarantee fund. The general funds of the society other than the guarantee fund were to be called the "assurance fund." By a policy effected with the society in 1850, reciting that the assured had agreed to become a member of the society, three of the directors covenanted with him that if he should regularly pay the premiums they or the directors of the society for the time being would, after proof of death, pay or cause to be paid out of the funds of the society the sum assured. In 1855, in pursuance of a resolution of a general meeting, the guarantee fund was paid off and put an end to, and the directors and shareholders mutually released each other. By an agreement in 1858, the *M.* society and its directors, with the sanction of a general meeting, transferred to the *B.* association all the goodwill, benefit, and advantage, premiums and assets of the society; and it was agreed that all the liabilities of the society in respect of the policies should be undertaken and borne by the association. The association indemnified the society and its directors; and it was agreed that all claims in respect of policies should be paid and satisfied out of the funds of the association. In 1858 the business of the *B.* association was transferred to the *A.* company. The life having dropped, and the *B.* association and the *A.* company being in liquidation, the executors of the assured presented a Petition to wind up the *M.* society:—*Held*, that the agreement in 1858 effected a complete novation of the contract entered into by the assured with the *M.* society; and Petition dismissed. *In re* Merchant's and Tradesman's Assurance Society - - - 694

NURSERY GARDEN—Lands Clauses Act, s. 92
See Part of House. [432

OBSTRUCTION TO HIGHWAY—*General Inclosure Act* (41 *Geo.* 3, *c.* 109)—*User—Lapse of Time.*] In 1811 a public road was set out across *L.* common by the *R.* Inclosure Commissioners of a width of fifty feet, and allotments of the land on either side of the road were at the same time made. About twenty-five feet only of the fifty feet allotted by the Commissioners had been used as the actual road; the sides which were left uninclosed having become covered with furze and heath, and fir trees had been allowed during the last twenty-five years to come up through the furze. In 1868 the Highway Board commenced cutting down, and advertised a sale of some of these fir trees growing within the fifty feet allotted by the Commissioners in 1811 for the public highway.—On bill by the owner of the adjoining land to restrain such cutting:—*Held*, that the right of the public was to have the whole width of the road, and not merely that part which had been used as the *via trita*, preserved free from obstructions; and that such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years.—*Semble*, that the Highway Board were only entitled to remove the trees which were an obstruction to the road, and not as against the owner of the soil to sell the timber of the trees when cut. Turner *v.* Ringwood Highway Board - - 418

OFFICIAL LIQUIDATOR—*Company—Winding-up—Costs—Remuneration of Liquidator—Solicitor's Bill.*] An official liquidator is not entitled to receive anything out of the assets of a company by way of remuneration until all the costs of the winding-up (including the bill of costs of the solicitor employed by him) have been paid in full. *In re* Massey. *In re* Freehold Land and Brick-making Company - - - - 367

ORDER AND DISPOSITION—*Bankrupt—Furniture—Bills of Sale Act* (17 & 18 *Vict. c.* 36).] A married woman gave up to her husband £500, held upon trust for her separate use, upon the understanding that the husband would settle his furniture upon her for her separate use. The husband assigned the furniture to a trustee to hold for the use and benefit of his wife, and the property remained in the joint possession of husband and wife. The assignment was not registered under the *Bills of Sale Act* (17 & 18 Vict. c. 36), and the husband afterwards became bankrupt.—Upon bill filed by the wife to have the assignment reformed so as to create a binding trust for her separate use, and to restrain the assignee from keeping possession of the furniture:—*Held*, that, independently of the *Bills of Sale Act*, the Plaintiff would have been entitled to have the furniture secured for her separate use; but the assignment operating as a bill of sale came within the Act, and not being registered under the Act, the furniture remained in the order and disposition of the bankrupt, and could not be protected against the assignee. Bill dismissed with costs. Ashton *v.* Blackshaw - - - - - 510

PARISH CHURCH—Notice of order *pro confesso*
See Pro Confesso. [356

PARLIAMENTARY DEPOSIT — Investment in Court - - - - 274
See Investment of Money in Court. 2.

PARLIAMENTARY VOTE—Fund held for public service—Jurisdiction - - 11
See Funds held for Public Service.

PARTIES—Attorney-General—Suit on behalf of inhabitants of a district - - 28
See Specific Performance—Works on Defendant's Land.

—— Child born after decree - 663, 665
See Revivor and Supplement. 2, 3.

—— Injunction—Vendor of land - - 636
See Covenant not to build.

—— Partition suit—Out of jurisdiction—Sale 227
See Partition Suit.

—— Specific performance—Sub-purchase 165
See Sub-contract.

PART OF HOUSE—*Lands Clauses Act*, 1845, *s.* 92—*House or other Building or Manufactory—Nursery Garden.*] A man, with his dwelling-house in a piece of ground 2⅛ acres in extent and surrounded by brick walls, used a part of the land as a nursery garden for trade purposes:—*Held*, that he was entitled, under s. 92 of the *Lands Clauses Act*, 1845, to compel a railway company, proposing, without actually touching the house, to take the greenhouses and a part which had been planted and used for ornamental purposes, to take the whole of the land. Salter *v.* Metropolitan District Railway Company - - 432

PARTITION SUIT—*Partition Act*, 1868 (31 & 32 *Vict. c.* 40)—*Sale—Parties out of Jurisdiction.*] The Court has jurisdiction to direct an immediate sale in a partition suit in the absence of parties interested in the property, but shewn to be out of the jurisdiction. But where it was uncertain whether such absent parties were or were not within the jurisdiction, an inquiry was directed as to the persons interested in the property and their shares therein, and whether such persons were out of the jurisdiction. Silver *v.* Udall - 227

PATENT—Infringement—Manufacture abroad—Sale in *England* - - - 217
See Infringement of Patent.

PAYMENT INTO COURT—Purchase-money under Lands Clauses Act - - - 68
See Costs under Lands Clauses Act.

PAYMENT OF MORTGAGE DEBT—7 *Geo.* 2, *c.* 20—*Action at Law—Payment of Mortgage Debt into Court of Exchequer—Liability of Mortgagor not discharged.*] The liability of a mortgagor who has been sued in an action at law, and who has, under the provisions of the statute 7 Geo. 2, c. 20, paid the principal and interest due on the mortgage into Court, continues until he has seen that the money has been properly paid out, and obtained from the Court an order of discharge. Bourton *v.* Williams - - - 297

PAYMENT OUT OF COURT—*Lands Clauses Act* (8 *Vict. c.* 18), *ss.* 70, 80—*Practice—Costs—Order for Payment of Dividends to Tenant for Life—Subsequent Order for Payment of Dividends to Tenant in Tail—Petition.*] An order had been obtained on Petition for payment to a tenant for life of dividends of a sum of stock representing purchase-money paid into Court under the *Lands Clauses Act* by a company which had taken land

PAYMENT OUT OF COURT—*continued.*
in settlement. The tenant for life died, and the guardian of an infant tenant in tail entered into receipt of the rents and profits. At the death of the tenant for life two dividends and a proportionate part of a third had not been received by him:—*Held*, that the order for the payment to the executors of the tenant for life of the dividends and apportioned part of the dividend might have been obtained by summons; but that the order for the payment of the other apportioned part of the dividend, and for future payment of dividends to the guardian of the infant tenant in tail, could properly be made only on Petition, of which the company must pay the costs. *In re* Jolliffe's Estate - - - - - 668

—— Lands Clauses Act—Payment to dowress - - - - 179
See Dower.

PETITIONER—Petitioner's debt—Winding-up [382, 447
See Winding-up Petition. 4, 5.

—— Settled Estates Act—Death of petitioner 71
See Settled Estates Act. 1.

PEW—Claim for—Prohibition - - 660
See Prohibition.

PIRACY—Newspaper - - - 324
See Newspaper.

PLEADING—Allegation of trust - - 11
See Funds held for Public Service.

—— Freeholder and copyholder of manor—Suit on behalf of - - - 241
See Right of Common.

POLICY OF LIFE ASSURANCE—*Grant of Annuity Policy of Assurance—Covenant to pay Premiums—Right of Grantor on Redemption.*] The circumstances under which the grantor of an annuity is entitled on redemption to have a policy of assurance effected on his life by the grantee delivered up, considered.—*Gottlieb* v. *Cranch* (4 D. M. & G. 440), and *Courtenay* v. *Wright* (2 Giff. 337), discussed. Knox *v.* Turner - - - 155

2. —— *Winding-up — Assurance Company—Payment of Premium—Forfeiture of Policy.*] A claim under a winding-up in respect of a policy of life assurance, held not to be affected by non-payment of the premium, the days of grace for payment of which expired after the commencement of the winding-up, by presentation of the Petition. *In re* Albert Life Assurance Company. Cook's Policy - - - - - 703

3. —— *Assurance Company — Winding-up—Policy-holders—Amount of Proof—Principles on which Estimate to be made.*] By policies of assurance it was witnessed that in case the insurers should at their respective deaths have paid to the directors of the assurance company the premiums therein respectively mentioned, the capital, stocks, and funds of the company should be liable to pay to the executors, administrators, or assigns of the insurers respectively the sums thereby respectively assured; and it was provided that the subscribed capital and other the funds of the company should, subject to all prior claims, alone be liable to answer claims by virtue of the respective policies, and that no director or proprietor of the said company, or other person interested therein, should be person-

POLICY OF LIFE ASSURANCE—*continued.*
ally liable to contribute to any claim by virtue of the respective policies, beyond the amount of the unpaid portion of his shares in the subscribed capital of the company.—The company having been ordered to be wound up:—*Held*, that a policy-holder was entitled to prove for the sum which would be required by a solvent assurance office, having the same rate of premiums and the same extent of proprietary capital as the company in liquidation, to be paid, in order to give the policy-holder a policy of the same amount, under the same conditions, whether ordinary or special, at the same premium.—The time for ascertaining the age of the assured to be the expiration of the period covered by the payment of the last premium before the winding-up order.—The choice of the office to be given neither to the policy-holder nor to the liquidator, but to be settled in Chambers.—No difference to be made in the case of participating policies, the chance of making profit having been speculated for and lost; except that where bonuses had been declared and not paid, the amount of such bonuses was to be added to the sum originally assured, and the total taken as the sum assured for the purpose of the estimate.—Where a change of circumstances had rendered a special contract of assurance necessary, such contract to follow the same rules.—The amounts necessary to be paid in order to obtain the above policies to be the same as if all the contracts were parts of one general bargain.—No shareholder to be liable to any one claiming by virtue of the policy beyond the amount of his unpaid capital; but all expenses not included within the contract to be borne by the shareholders.—After the funds had once reached the hands of the liquidator, no priority, one over another, to be allowed in respect of claims arising from the dropping of lives before the winding-up.—After the date of the winding-up order, the value of each claim to be struck at the time of first taking in such claim; the subsequent death of the assured before proof not to entitle the policy-holder to full payment but to be admissible as evidence of the value of the life. *In re* Albert Life Assurance Company. Bell's Case. Kerr's and Stubbs' Cases. Bleackley's Case. Craig's Executors' Case. Wilson's Case - - - - - - - 706

—— Transfer to another office 306, 316, 643, 694
See Novation of Contract. 1—4.

POWER—Appointment to family or next of kin
See "Family or Next of Kin." [622

—— Lapse of share of appointed fund - 423
See Lapsed Share.

—— Purchasing annuity - - - 260
See Power to purchase Annuity.

—— Revocation—Voluntary settlement - 44
See Voluntary Settlement. 1.

—— Revocation in excess of power—Election
See Election. 2. [519

POWER OF ATTORNEY—Wife's separate income
See Separate Estate. 1. [333

POWER OF DIRECTORS—*Company—Purchase of their own Shares—Ultrà vires—Completion of Contract.*] A company cannot recover back from a person who, at the request of the directors, has supplied goods to the company, money paid by the

POWER OF DIRECTORS—*continued.*
directors to him for the goods so supplied, although the purchase may have been wholly *ultrà vires*. The only remedy of the company in such a case is against the directors personally.—Where, therefore, the broker of a banking company, acting under the instructions of the directors, bought shares in the company on behalf of the company, and was credited with the price paid by him for the shares in his banking account kept with the company, and the company was afterwards wound up:—*Held*, that, although the transaction was *ultrà vires* of the directors, the broker was entitled to prove against the company for the balance appearing due to him on his account, including the item credited to him in respect of the shares. *In re* London, Hamburg, and Continental Exchange Bank. Zulueta's Claim - - 270

POWER TO PURCHASE ANNUITY — *Will—Trustee—Discretionary Power to lay out a Sum in purchasing an Annuity—Payment to Annuitant.*] Bequest of a share of residue to trustees upon trust to pay the income to *C.* for life, with a gift over of the principal, and a proviso that it should be lawful for the trustees, if they should think it desirable, to purchase with such share for the benefit of *A.* an irredeemable annuity. No annuity was purchased, but the acting trustee paid to *A.* various sums exceeding the income of the share, and amounting together to three-fourths of the capital:—*Held*, that the discretionary power was *pro tanto* well exercised, and that the remaindermen on the death of *C.* were only entitled to so much of the share as was undisposed of. Messeena *v.* Carr - - - - - - 260

PRACTICE—Affidavit of no settlement - 423
See Lapsed Share.

—— Amendment at hearing - - 229
See Forfeiture Clause.

—— Amendment of bill - - - 175
See Amendment, Materiality of.

—— Contempt of Court - - - 534
See Contempt of Court.

—— Death of one Plaintiff - - - 452
See Revivor and Supplement. 1.

—— Dismissal for want of prosecution - 35
See Dismissal for want of Prosecution.

—— Indorsement on order—Service without 137
See Taxation. 4.

—— Lands Clauses Act—Costs - - 668
See Payment out of Court.

—— Motion to vary certificate - - 451
See Motion to vary Certificate.

—— *Nunc pro tunc*—Supplemental order - 663
See Revivor and Supplement. 2.

—— Partition suit—Sale - - - 227
See Partition Suit.

—— Payment out of Court—Dividends—Summons or Petition - - - 668
See Payment out of Court.

—— *Pro confesso* - - - - 356
See Pro Confesso.

—— Production of documents - 132, 666
See Production of Documents. 1, 2.

—— Prohibition—Suit in Consistory Court 660
See Prohibition.

PRACTICE—*continued.*
—— Revivor and supplement 452, 663, 665
See Revivor and Supplement. 1, 2, 3.
—— Settled Estates Act—Death of Petitioner 71
See Settled Estates Act. 1.
—— Settled Estates Act—Payment of purchase-money - - - - 587
See Settled Estates Act. 2.
—— Sequestration—Defaulting trustee—Debtors' Act, 1869 - - - - 228
See Sequestration.
—— Supplemental order - - 663, 665
See Revivor and Supplement. 2, 3.
—— Withdrawal of winding-up Petition - 382
See Winding-up Petition. 4.
PRESCRIPTION—Claim for pew - - 660
See Prohibition.
PRIVILEGED COMMUNICATIONS - - 666
See Production of Documents. 2.

PRO CONFESSO—*Practice*—11 *Geo.* 4 *&* 1 *Will.* 4. *c.* 36—*Parish Church.*] The direction contained in 7 Will. 4 & 1 Vict. c. 45 (amending 11 Geo. 4 & 1 Will. 4, c. 36), that prior to taking a bill *pro confesso* against an absconding Defendant the order for his appearance by a certain day shall be posted on the door of the parish church of the parish where the Defendant made his usual abode within thirty days before absconding, is conditional upon such last abode having been parochial, and may be dispensed with in the case of an extra-parochial residence. Finney *v.* Godfrey - - 356

PRODUCTION OF DOCUMENTS—*Practice—Inspection — Accountant — Solicitors' Clerk.*] *L.*, a partner in an Indian firm now dissolved, had, in a suit against his former partners, obtained an order for production of the books, with leave to inspect. *L.* became bankrupt, and *B.*, his assignee, revived the suit.—Upon application by *B.* to have the benefit of the order, it appearing that the books were very voluminous, and that the accounts were kept in Indian currency :—*Held*, that *B.* was entitled to the benefit of the order to inspect; and to take in an accountant; and, it appearing that *L.* was conversant with accounts, and had himself kept some of the books, that *B.* was entitled to take in *L.* as such accountant.—An order having been made that *B.*, his solicitors or agents, be at liberty to inspect documents, with the assistance of *L.* as his accountant; *L.* and a clerk of *B.*'s solicitors' firm went to the place of inspection, and *L.* was refused to be allowed to inspect, except in the presence of *B.*, or one of the principals of his firm of solicitors :—*Held*, that *L.*, if accompanied by a duly authorized clerk of *B.*'s solicitors' firm, was at liberty to inspect. Lindsay *v.* Gladstone. Brooke *v.* Gladstone - - - 132

2. —— *Practice.*] Upon the purchase by *A.* from mortgagees selling under their power of sale, letters passed between the solicitors of *A.* and of the mortgagees, in which reference was made to an anticipated claim by *B.* to a legacy as charged upon the mortgaged property. *B.* subsequently filed a bill to establish a charge in respect of her legacy upon the property in the hands of *A.* :—*Held*, that the correspondence between the solicitors of *A.* and of the mortgagees before the institution of the suit was not privileged from production. Paddon *v.* Winch - - 666

PROHIBITION—*Consistory Court—Jurisdiction—Pews—Prescription—Form of Order.*] A prohibition will issue out of Chancery in vacation time, upon an *ex parte* application to restrain a spiritual Court from trying a claim by prescription to pews in a parish church. *In re* Bateman - 660

PROJECTING ROOM — *Trespass — Contiguous Houses—Room of one House projecting over Site of the other—Right to Column of Air over Projection.*] Plaintiff, the owner of two contiguous houses in the city of *London*, sold one to the Defendants by a conveyance which correctly marked out the ground site of the house conveyed. One of the first-floor rooms in the house retained by the Plaintiff projected over the site, and was supported by the other house :—*Held*, that the vertical column of air over so much of the room as overhung the Defendants' site belonged, not to the Plaintiff, but to the Defendants. Corbett *v.* Hill - - - - - - 671

PUBLIC-HOUSE—Agreement not to keep—Breach by sub-tenant - - - 678
See Restraint of Trade. 2.
—— Covenant against keeping - 26, 674
See Covenant not to keep Public-House. 1, 2.
PUBLIC POLICY—Covenant not to manufacture
See Restraint of Trade. 1. [345
PUFFER—*Sale by Auction—Reserved Bidding—30 & 31 Vict. c.* 48.] Upon a sale of real estate by auction, under conditions stating that the sale is subject to a reserved bidding, it is illegal to employ a person to bid up to the reserved price unless the right to do so is expressly stipulated for. Gilliat *v.* Gilliat - - - 60
PURCHASE-MONEY—Appropriation of interest [56
See Appropriation of Purchase-money.
—— Lands Clauses Act - - - 68
See Costs under Lands Clauses Act.
—— Lands Clauses Act—Interim investment 178
See Investment of Money in Court. 1.
—— Lands Clauses Act—Payment to dowress
See Dower. [179
—— Settled Estates Act—Payment to trustees
See Settled Estates Act. 2. [587
RACING DEBT—*Bond—Consideration.*] A bond given to persons to whom the obligor had lost bets on horse-races, which he was unable to pay, in order to prevent them from taking the steps which, under the conventional code established among betting men, they were entitled to take, and which would have been followed by consequences involving the obligor in considerable pecuniary loss :—*Held*, to be valid, and proveable against the obligor's estate. Whether a bond given simply to secure a racing debt is valid, *quære*. Bubb *v.* Yelverton - - 471
RAILWAY COMPANY—Judgment against 148
See Scire Facias against Shareholder.
—— Specific performance—Making and maintaining road and wharf - - 28
See Specific Performance—Works on Defendant's Land.

RECEIVER—*Annuity charged on Land—Power of Distress*—4 *Geo.* 2, *c.* 28.] A testator gave an annuity, which he directed to be paid by his son; and, subject to and charged with the payments of his debts and the legacies and annuity thereinbefore mentioned, he devised and bequeathed his real and personal property to his son absolutely. The annuity fell in arrear, after having been regularly paid for twenty years, and the annuitant filed his bill to enforce payment, and moved for a receiver:—*Held*, that the annuity being charged upon land, with a power of distress superadded by the statute 4 Geo. 2, c. 28, the Plaintiff had power to help himself, and was not entitled to a receiver. Sollory *v.* Leaver - - 22

2. —— *Default in Payment of Balance—Practice—Committal—Cons. Ord. xxix. r.* 3.] Where a receiver makes default in payment of a balance due from him payment may be enforced by committal. Whether an attachment may be had, *quære*. *In re* Bell's Estate. Foster *v.* Bell [172

3. —— *Creditors' Deed—Inspectorship—Default of Receiver—Agent—Liability of Inspectors.*] By a creditors' deed, which provided that the debtor should carry on his business under the supervision of inspectors, the debtor covenanted with the inspectors that he would allow *C.*, "who was intended by the inspectors to be employed as an accountant, or such other person as they might employ in lieu of *C.*," to collect and receive the moneys due to the debtor, and pay the balance into the bank. *C.* made default in payment of a large sum received by him:—*Held*, that *C.* was not the agent of the inspectors, and that they were not liable to account to the debtor for *C.*'s misfeasance. Hobson *v.* Jones - - - 456

RECITAL—Covenant to settle share in joint tenancy—Severance - - 410
See Joint Tenancy.

—— False recital in mortgage—Building society
See Building Society. 1. [597

—— Mistake—Gift by implication—Will - 376
See Gift by Implication.

RECTIFICATION OF REGISTER—*Company*—25 & 26 *Vict. c.* 89, *s.* 35.] Upon motion under the 35th section of 25 & 26 Vict. c. 89, to rectify the register of a company by striking off certain shares:—*Held*, that the case was one of so much doubt and difficulty, involving as it did the disputed construction of documents, that the Court could not make an order under the summary powers of the 35th section. Motion refused without prejudice to a bill being filed. *In re* Heaton Steel and Iron Company. Simpson's Case 91

—— Shares of bankrupt shareholder—Laches of assignees - - - - 653
See Bankrupt Shareholder.

REFERENCE TO ARBITRATION—Revocation of [523
See Revocation of Submission to Arbitration.

REGISTER—Rectification of—Question of doubt and difficulty - - - 91
See Rectification of Register.

REGISTER OF BIRTH—*Evidence—Date of Birth*—6 & 7 *Will.* 4, *c.* 86.] The entry in a register of births under 6 & 7 Will. 4, c. 86, is evidence of the birth having taken place before the date of registration, but not of the exact date of birth. *In re* Wintle - - - - - 373

REGISTER OF MARRIAGE—Mutilation of book
See Limitations, Statute of. [571

REGISTRATION—Copyright in newspaper 324
See Newspaper.

—— Shares—Delay in registering - - 589
See Transfer of Shares. 4.

—— Shares—Non-execution of transfer - 5
See Transfer of Shares. 1.

—— Shares—Power of directors to refuse - 223,
See Transfer of Shares. 2, 3. [225, n.

REGISTRATION UNDER BANKRUPTCY ACT, 1861, s. 194—*A Legal Proceeding pending in Bankruptcy or otherwise—Bankruptcy Repeal and Insolvent Court Act* (32 & 33 *Vict. c.* 83), 1869, *s.* 20.] Section 197 of the *Bankruptcy Act*, 1861, gives the Court of Bankruptcy jurisdiction over deeds registered under sect. 194.—*Pearson* v. *Pearson* (Law Rep. 1 Ex. 308), considered.—The jurisdiction of the Court of Bankruptcy over a deed registered under sect. 194 is within the saving in sect. 20 of the *Bankruptcy Repeal and Insolvent Court Act*, 1869. *Ex parte* Atkinson. *In re* Brooksbank - - - - - 736

RELEASE—Equitable covenant not to execute power - - - - 191
See Release of Power.

RELEASE OF POWER—*Settlement—Construction—Voluntary Covenant to forego a General Power of Appointment by Will—Release to Trustees—Validity of Release in Equity.*] By a post-nuptial settlement a settlor, in 1837, granted lands to trustees upon trust, after the death of the survivor of the settlor and his wife, to such persons and for such uses as the settlor should by will appoint, and in default of appointment for all the children of the settlor. The deed contained an ultimate limitation, if there should not be any child of the existing marriage, for the settlor absolutely. In 1841 the wife died, leaving four children of the marriage. By a re-settlement in 1848, to which the same trustees were parties, after reciting that it had been proposed that the settlor should give up his life estate in the premises, and forego the power given to him of appointing by will, the settlor granted the rents and profits during his life to the trustees upon trusts for the benefit of his four children. He also covenanted with the trustees that he would not make any will whereby the trusts thereby declared should be impeached or defeated, and released the trustees from all the trusts of the former settlement. Shortly afterwards he married again, and had seven children by his second marriage. He died in 1866, having by will devised and bequeathed all his real and personal estate upon trust for his wife for life, and after her death upon trust to sell, and divide the proceeds among the children of the second marriage:—*Held*, that the ultimate limitation in the deed of 1837 did not cut down the meaning of the word "children" of the settlor to children of the first marriage; and that the children of both marriages were entitled to the benefit of the deed of 1837:—*Held*, further, that the covenant and release in the deed of 1848, though voluntary, operated in equity as an effectual release of the power

RELEASE OF POWER—*continued.*
of appointment by will in the settlement of 1837:—*Held*, further, that the power was wholly released, and that the release of the power was not confined to the shares of the children of the first marriage, who alone were living at the date of the deed of 1848. Isaac *v.* Hughes. Same *v.* Same [191

REMUNERATION OF OFFICIAL LIQUIDATOR
See Official Liquidator. [367

RENT—Minimum rent in lease of coal mine 538
See Covenant to work Mines.

REPRESENTATIONS — Fund applicable to payment of bill of exchange - - 497
See Securities for Bills of Exchange. 1.

RESERVED BIDDING - - - 60
See Puffer.

RESIDUARY DEVISE—Legal estate in mortgage [563
See General Devise of Real Estate.

RESIDUARY LEGATEE—Repayment of sum overpaid—Costs - - - - 507
See Mistake of Testator. 2.

RESPONDENTS TO PETITION—*Locus standi* of—Winding-up petition - - 80
See Winding-up Petition. 2.

RESTRAINT OF TRADE—*Sale of Secret—Covenant not to manufacture—Public Policy.*] Although public policy requires that every man shall be at liberty to work for himself, and shall not deprive himself or the state of his labour, skill, or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labour, skill, or talent, and when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive upon himself, are not unreasonable, having regard to the subject matter of the contract.—Upon the formation of a company for the purchase and working of a certain process of manufacture introduced into this country from *America*, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of *Europe*, any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory" (of the vendors) "and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased":—*Held*, that the restriction contained in this clause was not greater, having regard to the subject matter of the contract, than was necessary for the protection of the purchasers, and was capable of being enforced against the vendors. Leather Cloth Company *v.* Lorsont - 345

2. —— *Grantor and Grantee—Separate Agreement by Grantee in Restriction of Trade—Breach of Agreement by Sub-Tenant from Year to Year—Remedy against Sub-Tenant.*] A grantee in fee of a piece of building land entered into a separate agreement with the grantor, that during twelve years and a half no building on the premises

RESTRAINT OF TRADE—*continued.*
should be used for "the sale of ale, beer, spirits, wine, porter, or as an inn, public-house, or beer-house." His assignee built a house on the land, and let it from year to year to a tenant, who opened it as a public-house. The assignee said he had no knowledge of the restriction; but this statement was disproved.—Upon bill for an injunction against the assignee and his tenant:—*Held*, that no relief could be had against the tenant, who, if he had asked his lessor, would have been told there was no restriction, and if he had seen the conveyance, would have found none: and bill, as against him, dismissed with costs. Carter *v.* Williams - - - - 678

—— Covenant not to keep public-house 26, 674
See Covenant not to keep Public-house. 1, 2.

RESULTING TRUST—*Settlement of Family Plate—Gift by Implication—Gift over—Construction.*] By a settlement made in 1811, the *Cardigan* family plate was settled upon trust for *Robert*, then Earl of *Cardigan*, for life, and after his decease for *James Thomas* Lord *Brudenell*, the son and heir apparent of *Robert* Earl of *Cardigan*, for his life, and after his decease in trust for the first son of the body of *James Thomas* Lord *Brudenell*, his executors and assigns; but if such first son should die under twenty-one, without leaving issue male living at his death, then for the second son, his executors, administrators, and assigns, with like executory trusts in favour of the other sons of *James Thomas* Lord *Brudenell*; and if he should not have any son or sons, or having such all of them should die under twenty-one, and some of them should leave issue male living at his death, then in trust for the second son of *Robert* Earl of *Cardigan*, his executors, administrators, and assigns; but if such second son should die under twenty-one without leaving issue male living at his death, then in trust for the third and other sons of *Robert* Earl of *Cardigan*; and if there should not be any son of the said *Robert* Earl of *Cardigan*, or the said *James Thomas* Lord *Brudenell*, who should live to attain the age of twenty-one years or should die under that age leaving issue male living at his death, then in trust for the settlor.—*Robert* Earl of *Cardigan* had only one son, *James Thomas* Lord *Brudenell*, who attained twenty-one, and died without issue:—*Held*, that upon his death, the ultimate trust in favour of the settlor took effect, the words "any son" in the gift over being read "any such son as is hereinbefore mentioned." Cardigan *v.* Curzon-Howe - 358

REVERSION—Joint tenancy—Severance—Covenant to settle - - - 410
See Joint Tenancy.

REVERSIONARY INTEREST OF WIFE—Compromise of suit relating to - - 58
See Compromise by Married Woman.

—— Infant—Confirmation - - - 468
See Infant's Settlement.

REVERTER—Land used for burial-ground 579
See Burial-ground.

REVIVOR AND SUPPLEMENT—*Practice—Death of One of Two Plaintiffs—Revivor unnecessary.*] Bill by two persons, claiming, one to be tenant for life of an estate, the other to be tenant in fee (subject to the first Plaintiff's life estate) of one-third

REVIVOR AND SUPPLEMENT—*continued.*

of the entirety, against a Defendant, *T. W.*, who claimed the entirety by an adverse title, and other Defendants who claimed the remaining two-thirds under the same title as the second Plaintiff, alleging that *T. W.* had begun to cut timber on the estate, and threatened to cut the whole, and praying that he might be restrained.—The first Plaintiff died:—*Held*, that revivor was not necessary; and that the surviving Plaintiff had a sufficient interest in the subject matter to continue the suit. Wilson *v.* Wilson - - - - 452

2. —— *Practice—Infant born since Suit—Omission by Inadvertence to make the Infant a Party—Supplemental Order nunc pro tunc*—15 & 16 *Vict. c.* 86, *s.* 52.] After decree in an administration suit, an infant was born, who shortly after his birth became interested in possession, and was a necessary party, but was, by inadvertence, overlooked. Sales were made and approved, and upon the investigation of one of the titles, the omission was discovered:—*Held*, that it was not a case for revivor; and a supplemental order made, that the proceedings should be of the same force and effect as if the infant had been made a party immediately after his birth. Walker *v.* Walker 663

3. —— *Practice—Supplemental Bill—Infants*—15 & 16 *Vict. c.* 86, *s.* 52.] Proceedings having been taken in a suit after it had become defective by the birth of children of the class entitled:—*Held*, overruling *Grunwell* v. *Garner* (Law Rep. 8 Eq. 355), that the children could not be brought before the Court by supplemental order. Scott *v.* Duncombe - - - - - 665

REVOCATION—Excess of power—Election 519
See Election. 2.

—— Submission to arbitration - - 523
See Revocation of Submission to Arbitration.

REVOCATION OF SUBMISSION TO ARBITRATION—*Power to revoke Submission—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125)—*Construction of Agreement of Reference.*] The power to revoke without the leave of a Court a submission to arbitration, which does not contain a consent clause for making the submission a rule of Court, is not affected by the *Common Law Procedure Act*, 1854.—*A.* and *B.* having dissolved partnership, signed an agreement by which, after stating that *B.* had offered *A.* £18,000 for the purchase of his interest in the partnership business and assets, and that *A.* had declined the offer but was willing to accept £20,000, they agreed to leave it to a referee to say what sum should be paid by *B.* to *A.*:—*Held*, that the authority of the arbitrator was restricted to awarding a sum not less than £18,000 nor greater than £20,000; and that the agreement was revocable by either party at any time before the award was made. Thomson *v.* Anderson - - - - - 523

RIGHT OF COMMON—*Bill on behalf of Freeholders and Copyholders of Manor—Frame of Suit—Misjoinder—Survey by Crown—Evidence.*] A suit for the purpose of establishing a right of common over the wastes of a manor may be maintained by a copyhold and freehold tenant of the manor on behalf of himself and all other copyhold and freehold tenants.—A document purporting to be a survey of a manor made while it was part of the

RIGHT OF COMMON—*continued.*

possessions of the Duchy of *Cornwall*, and coming out of the proper custody, is admissible as evidence of the boundaries and customs of the manor. Smith *v.* Earl Brownlow - - - - 241

ROOM—Projecting over site of adjoining house
See Projecting Room. [671

RYDE'S SCALE—Surveyor's charges - 69
See Taxation. 2.

SALARY—*Company—Winding-up—Manager—Termination of Engagement—Compensation.*] By the articles of association of a company, *L.* was appointed manager; and it was provided that if he should at any time be deprived of or removed from his office for any other cause than gross misconduct the directors should pay to him a certain sum within one month from the time of his removal. The company was ordered to be wound up:—*Held*, that *L.* was entitled to prove in the winding-up for the sum specified by the articles without any such deduction being made as in *Yelland's Case* (Law Rep. 4 Eq. 350). *In re* London and Scottish Bank. *Ex parte* Logan [149

SALE—Beer to be consumed off the premises 26
See Covenant not to keep Public-house. 1.

—— Partition suit - - - - 227
See Partition Suit.

—— Railway lands - - - - 658
See Sale of Railway Lands.

—— Settled Estates Act—Payment of purchase-money to trustees - - - 587
See Settled Estates Act. 2.

—— Wine and spirits—Covenant—Restraint of trade - - - - - 674
See Covenant not to keep Public-house. 2.

SALE OF RAILWAY LANDS—*Judgments Law Amendment Act* (27 & 28 *Vict. c.* 112)—*Judgment Creditor—Railway Company—Surplus Land—Sale.*] Upon the Petition of a judgment creditor of a railway company, an order was made, without directing inquiries, for a sale of surplus land of the company, not required for the undertaking and not used for building purposes, which had been delivered in execution to the Petitioner under a writ of *elegit*, the registry of which was still in force. The company were ordered to execute a proper conveyance. *In re* Calne Railway Company - - - - - - 658

SCIRE FACIAS AGAINST SHAREHOLDER—*Judgment against Railway Company—Practice—Form of Order—Companies Clauses Act* (8 *Vict. c.* 16), *s.* 36.] Upon an application under sect. 36 of the *Companies Clauses Act*, for leave to issue execution against shareholders of a company which had been ordered to pay a sum of money and failed in doing so, the Court will give the shareholders an opportunity of questioning the validity of the order; but is not bound to do so by directing a writ of *scire facias* to issue. Healey *v.* Chichester and Midhurst Railway Company [148

SCRIPHOLDER—*Company—Provisional Certificates—Liability to take Shares—Forfeiture.*] *C.* applied for and was allotted shares in a banking company, paid the first instalment in the usual

SCRIPHOLDER—*continued.*
way, and received provisional certificates, which, on payment of the second instalment, and on executing the deed by a given day, were to be exchanged for shares, but in default of payment the rights and privileges appurtenant to the certificate were to be forfeited. He failed to pay the second instalment and to exchange his certificates. The company passed into liquidation:—*Held*, that he was under no obligation to take shares, and that his interest was forfeited, and that he was therefore not liable to be placed on the list of contributories. *In re* Asiatic Banking Corporation. *Ex parte* Collum - - - - 236

SECURITIES FOR BILLS OF EXCHANGE — *Foreign Banker—Bankruptcy—Appropriation—Representations.*] The Plaintiffs purchased from the *New Orleans Bank* a bill of exchange, drawn on the *Bank of Liverpool*, upon the faith of representations by the *New Orleans Bank* that they had funds in the *Bank of Liverpool*, out of which the bill would be paid at maturity; but soon after the purchase, the *New Orleans Bank* having suspended payment (without any proceedings in bankruptcy), the *Bank of Liverpool* refused to accept or pay the bill, although they had ample funds of the *New Orleans Bank*:—*Held*, on a bill filed against both the banks, that the Plaintiffs were entitled to payment out of those funds.—Where money is paid on the faith of a representation that a security for it will be paid out of a particular fund, the party who receives the money and makes the representation will not be permitted to withdraw the fund out of which the promised payment is to be made. Thomson *v.* Simpson - 497

2. —— *Bankruptcy—Proof against the Estate of a Surety—Letter of Credit—Bills drawn on behalf of a Company—Companies Act*, 1862, *s.* 47.] A bank granted a letter of credit to a company on terms that the company should ship tea and forward bills of lading, invoices, and policy of insurance on the tea to the bank, and should also draw on *B. & Co.* bills, to be accepted by *B. & Co.* to an amount sufficient to cover the amount authorized by the letter of credit. *B. & Co.* guaranteed the performance by the company of these terms, "holding themselves responsible for the same." The company drew on the bank, and the bank accepted the bills, but owing to the failure of the bank after the dates when the bills were drawn and before they became due the company shipped no tea, and did not perform any of the terms agreed on. All the bills were eventually paid:—*Held*, that the failure of the bank was no reason why the company should not have performed its part of the contract, and that *B. & Co.* were not relieved from their guarantee. *Ex parte* Agra Bank. *In re* Barber & Co. - - - 725

SEIZURE QUOUSQUE —Copyholds — Statute of Limitations - - - - 83
See Copyholds.

SEPARATE ESTATE—*Married Woman—Separate Income—Power of Attorney by Husband and Wife—Next Friend—Costs.*] Where a married woman, who was entitled to the income of property held on trust for her separate use, with a restraint on anticipation, joined with her husband in a power of attorney to receive and to sue for any moneys due to them or either of them;—*Held*, that the

SEPARATE ESTATE—*continued.*
trustee was not justified in paying the attorney the wife's separate income. Neither would the power entitle the attorney to institute an administration suit in the name of the wife by himself as next friend.—Where a next friend of a married woman institutes, without her consent, a useless suit he will be ordered to pay the costs. Kenrick *v.* Wood - - - - - 333

2. —— *Liability of—Husband and Wife—Debt of Wife contracted before Marriage—Bankruptcy of Husband.*] Property settled by a woman upon her marriage to her separate use is liable after her husband's bankruptcy for debts contracted by her before her marriage. Chubb *v.* Stretch - 555

—— Furniture in possession of wife - - 510
See Order and Disposition.

SEQUESTRATION —*Practice—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62, *ss.* 4, 8).] Writ of sequestration issued against the property of a personal representative, who was in default for non-compliance with an order for payment of money, without attachment of his person. Sykes *v.* Dyson [228

SETTLED ESTATES ACT (19 & 20 *Vict. c.* 120)—*Practice—Petition—Death of Petitioner—Amendment.*] After a Petition under the *Leases and Sales of Settled Estate Act* had been served and advertised, the Petitioner died:—*Held*, that the Petition might be amended by stating the fact, and substituting a new Petitioner. *In re* Wilkinson's Settled Estates - - - 71

2. —— (19 & 20 *Vict. c.* 120) *ss.* 23, 25—*Practice—Payment of Proceeds of Sale to Trustees.*] Where lands settled in trust for the separate use of a married woman for life without power of anticipation, and after her death in trust for sale, were, in the lifetime of the tenant for life, ordered to be sold under the *Leases and Sales of Settled Estates Act*, the proceeds of the sale were ordered to be paid to the trustees of the settlement, to be held upon the trusts declared of purchase-money by the settlement. *In re* Morgan's Settled Estates - - - - - 587

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—— Family plate - - - - 358
See Resulting Trust.

—— Infant—Confirmation - - - 468
See Infant's Settlement.

—— Severance of joint tenancy—Court to settle
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—— Succession duty—Jointure - - 212
See Succession Duty.

—— Voluntary - - - 44, 206, 463
See Voluntary Settlement. 1, 2, 3.

—— Voluntary covenant not to execute power
See Release of Power [191

—— Younger son becoming eldest son - 491
See Eldest Son.

SETTLEMENT BY COURT OF CHANCERY — *Wife's Equity to a Settlement—Extent of the Right—Husband's Legal Right—Form of Settlement—Ultimate Limitation.*] The extent of a wife's equity to a settlement is to have a provision made out of the fund for herself and her children by

SETTLEMENT BY COURT OF CHANCERY—*cont.*
her present or any future marriage; and Courts of Equity will not interfere with the marital right beyond what is necessary to give effect to the wife's equity.—Hence the form of the ultimate limitation in a settlement made by the Court of property subject to a wife's equity is, after the death of the wife, and failure of children of her present or any future marriage, for the benefit of the husband, whether he survives the wife or not. —Observations on *Spirett* v. *Willows* (Law Rep. 1 Ch. 520; Ibid. 4 Ch. 407) and *In re Suggett's Trusts* (Law Rep. 3 Ch. 215). CROXTON *v* MAY [404

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—— Negligence — Opinion of competent surveyors - - - - 276
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—— Taxation - - - 63, 72, 137, 147
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SOLICITOR'S CLERK—Inspection of documents by - - - - - 132
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SOLICITOR'S LIEN—*Charge for Costs*—23 & 24 *Vict. c.* 127, *s.* 28.] The charge for costs to which a solicitor is entitled under 23 & 24 Vict. c. 127, s. 28, extends to the property of his own client only, and not to that of other persons.—By a settlement, real estate was assured to the use of *A.* for life, with remainder to his children, as he should by deed or will appoint, and in default of appointment to the use of his children as tenants in common in tail, with cross remainders in tail between them. In a suit to which *B.* was a Defendant, an appointment by *A.* was set aside, so that the property was left to devolve according to the limitations of the settlement in default of appointment, and *B.* became thereby entitled to an estate tail in certain undivided shares of the property. *B* afterwards died a bachelor, and without having executed a disentailing deed; and the shares to which he was entitled devolved, under the settlement, upon the Plaintiff and two Defendants to the suit as tenants in common in tail:—*Held*, that, under these circumstances, *B.'s* solicitor was not entitled to a charge for costs under 23 & 24 Vict. c. 127, s. 28, on *B.'s* shares of the settled property. BERRIE *v.* HOWITT - 1

SOLICITOR, NEGLIGENCE OF—*Solicitor and Client—Building Agreement—Mortgage Securities —Imprudence of Solicitor—Knowledge of Client—Charges of Fraud and improper Motives.*] Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the Court dismissed the bill; and as fraud and improper motives were charged without evidence to support those charges, the bill was dismissed with costs. CHAPMAN *v.* CHAPMAN - - - 276

SPECIALTY DEBT—Equity of redemption in copyholds - - - - - 443
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SPECIFIC PERFORMANCE—WORKS ON DEFENDANT'S LAND—*Railway Company—Agreement to make and maintain—Ultrà Vires—Parties —Attorney-General.*] In consideration of certain landowners obtaining from the Admiralty a waiver of an obligation imposed upon a railway company by their Act to construct certain works, and upon conveyance of the necessary land by the landowners, the railway company entered into an agreement with them to make a carriage road between certain specified points, and also to make and maintain a wharf for loading and discharging vessels at a specified place, of a stipulated length, and of a suitable and convenient height. The obligation imposed upon the company by their Act had been waived by the Admiralty; and the land required had been conveyed to the company, who had commenced but had not finished the road, and had not commenced the wharf:—*Held*, on demurrer by the company to a bill by the landowners for specific performance of the agreement, 1, that, having obtained the benefit of the agreement by being thereby released from an onerous obligation, and allowed to substitute something more easy of performance, the company would not be allowed to evade the agreement; 2, that the agreement was not *ultrà vires*, and might be enforced against them; and 3, that the Attorney-General was not a necessary party to a suit for specific performance of an agreement entered into with a company by certain persons on their own behalf, and as representing the inhabitants of the district. *Storer* v. *Great Western Railway Com-*

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SUB-CONTRACT — *Agreement and Sub-agreement —Specific Performance — Parties — Demurrer.*] Vendors, to their bill against their purchaser for specific performance of, or for rescinding the agreement, made a sub-purchaser a Defendant; and the sub-purchaser afterwards filed a bill against his vendor for specific performance of his agreement, and made the original vendors Defendants.—A demurrer by the original vendors to the sub-purchaser's bill, was overruled on the ground that they had made him a Defendant to their bill. —*Tasker* v. *Small* (3 My. & Cr. 63), and *Aberaman Ironworks* v. *Wickens* (Law Rep. 4 Ch. 101), explained. FENWICK *v.* BULMAN - - 165

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SUCCESSION DUTY—*Succession Duty Act* (16 & 17 *Vict. c.* 51), *ss.* 20, 42.] Lands charged with payment of a jointure were settled, and a power of sale, with the consent of the tenant for life for the time being, was thereby given to the trustees. A portion of the property was sold with the consent of the tenant for life and the jointress:—*Held*, that the land sold would not be subject to succession duty on the determination of the jointure, and that the purchaser must complete without indemnity against it. DUGDALE *v.* MEADOWS - 212

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SURVIVORSHIP—*Will—Divesting Clause—Death in Lifetime of Tenant for Life.*] Bequest of residuary estate to testator's wife for life, and, after her death, of "one-fifth of my residuary estate unto each of my two sons *J.* and *C.* absolutely and to be paid and transferred to them respectively or to such of them as shall be living at the time of the decease of my said wife or the children of such of them as may be then dead the children of such as shall be dead taking the part or share only which their parent would have taken if living with benefit of survivorship as between my two sons in the event of either dying without issue in my lifetime."—*C.* survived the testator, but died a bachelor in the lifetime of the widow. *J.* survived the widow:—*Held*, that, upon the death of the widow, *J.* was entitled to two fifths of the residuary estate. *In re* CLARK'S TRUSTS - - - 378

SUSPENDING BANKRUPTCY—*Bankruptcy Act*, 1861, *s.* 110—*Death of Trustee—Appointment by Court of Chancery of New Trustee—Trustee Acts.*] Where proceedings in a bankruptcy have been suspended by a resolution of the creditors, passed under sect. 110 of the *Bankruptcy Act*, 1861, and the trustee appointed by the creditors to wind up the estate and effects of the bankrupt has died, the Court of Chancery has jurisdiction, under the Trustee Acts, to appoint new trustees. *In re* RAPHAEL'S TRUST ESTATE - - - 233

TAXATION—*Solicitor and Client—Costs in respect of Business done while uncertificated—Order of Course taken out by Client—6 & 7 Vict. c. 73, s. 26.*] The *Solicitors Act* (6 & 7 Vict. c. 73, s. 26) does not extinguish the debt of a solicitor or attorney for costs in respect of business done while uncertificated, but only his remedy.—Accordingly, where a client had taken out an order of course for taxation of his solicitor's bill of costs, with the usual submission to pay what should be found due, and the Taxing Master had disallowed certain items for business done while his certificate had not been renewed:—*Held*, that the solicitor was entitled to be allowed the items in question. *In re* JONES - - - - - 63

2. —— *Costs — Surveyor's Charge — Ryde's Scale—Lands Clauses Act, s.* 80.] Upon the taxation of a bill of costs relating to the re-investment in land of moneys paid into Court under the *Lands Clauses Act*, the Taxing Master allowed a lump sum for surveyor's charges, being a commission on the amount of the purchase-money according to *Ryde's Scale*, which is a scale prepared by an eminent surveyor of that name on the principle that a commission varying from 5 to one-half per cent. should be paid to the surveyor according to the amount of the purchase-money. An application was made to the Court to direct the Taxing Master to review his taxation in respect of this item:—*Held*, that the question was in reality one not of principle but of amount, and that the Court would not interfere; but that if it were a question of principle a prevailing practice of paying surveyors by commission ought not to be disturbed. ATTORNEY-GENERAL *v.* DRAPERS' COMPANY 69

3. —— *Solicitor and Client—Bill of Costs—Bankruptcy of Client—Taxation by Assignee—Undertaking to pay.*] Where the client of a solicitor becomes bankrupt, and the solicitor does not prove for the amount of his bill of costs in the bankruptcy, the assignee cannot obtain an order to tax without giving an undertaking to pay the whole amount of the bill. *In re* ELMSLIE & CO. - 72

4. —— *Solicitor and Client—Practice — Informal Service, without Indorsement — Affidavit sworn before Agent of Solicitor who prepared it—Writ of Attachment—Irregularity—Motion to discharge—Costs.*] Messrs. *G.*, solicitors, having been requested by *P.*, another solicitor, on behalf of a client for whom they had hitherto acted, to deliver up all deeds belonging to the client on the usual terms, sent the deeds to a relative of the client who held a power of attorney from him, with the bill of costs, the amount of which they retained out of moneys in their hands belonging to the client, and they then informed *P.* that they had no deeds in their possession, and no bill of costs against the client. An order of course was then taken out by *P.*, on behalf of the client, for taxation and delivery up of deeds and papers, but it was not complied with, and a writ of attachment was issued against Messrs. *G.* On a motion to set aside the attachment with costs to be paid by *P.* personally:—*Held*, that, in the circumstances of the case, Messrs. *G.* were not justified in refusing to deliver up the papers, or to give in their bill for taxation:—*Held*, also, that it was no ground of objection to the attachment, that, in consequence of the indorsement required by Cons. Ord. XXIII. r. 10 being omitted in the order first served on Messrs. *G.*, it had been served a second time in proper form more than fourteen days afterwards; nor that the affidavit prepared by *P.* of non-compliance with the order, on which the attachment was issued, was sworn by the client before a solicitor to whom *P.* had sent it for the purpose of getting it sworn, and who was his agent for that purpose only; nor that a month had elapsed between the date of the affidavit and the issuing of the attachment:—*Held*, also, that no misconduct having been alleged or proved against *P.* in regard to the attachment, he could not on other grounds be made liable for the costs of such an application, and that the motion must be refused with costs. *In re* GREGG. *In re* PRANCE - 137

5. —— *Default in Payment of Balance due from Solicitor—Attachment—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.] Default by a solicitor in payment of a balance found due from him upon taxation of his bill of costs under the common order for that purpose, is default in payment of a sum of money ordered to be paid by the solicitor in his character of an officer of the Court within the meaning of the *Debtors Act*, 1869, s. 4, subs. 4, and an attachment may be issued against him. *In re* RUSH, A SOLICITOR - - - 147

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TENANT IN TAIL—Remainderman—"Entitled" to estate - - - - 200
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See Restraint of Trade. 1, 2.

TRANSFER OF SHARES—*Company—Contributory—Transfer not executed by Transferee—Non-acceptance—Registration.*] In December, 1865, a company registered a transfer of shares from *A.* to *B.*, which had not been executed by *B.*; and placed *B.'s* name on the list of shareholders. In August, 1866, the Court, on the application of *B.*, made an order directing *B.'s* name to be removed from the register of shareholders on the ground that *B.* had not accepted the shares. The company accordingly removed *B.'s* name, but did not restore *A.'s*. Afterwards the company was ordered to be wound up:—*Held*, that *A.* was a contributory. *In re* Merchants' Company. Heritage's Case - - - - - - - 5

2. —— *Company—Power of Directors to decline to register Transfer—Wilful Misrepresentation.*] On the day prior to the stoppage of a limited company, a transfer of shares was executed by *P.* to *L.* for the stated consideration of £17, *L.* being described as a "gentleman." The transfer was sent by *P.'s* broker to the office of the company, where it was registered, and *L.'s* name was inserted on the register of members. Shortly afterwards, a voluntary winding-up was resolved upon, which was afterwards ordered to be continued under supervision. Three years afterwards the liquidators discovered that *L.*, at the date of the transfer, was a clerk with a salary of 25*s.* a week in the same office as *P.*, and that the real consideration was, not £17 paid by *L.* to *P.*, but £5 paid by *P.* to *L.* to induce him to execute the deed.—It was admitted that the transfer was out and out; and the directors had power to decline to register any transfer if they did not approve of the transferee:—*Held*, that the name of *L.* must be removed from the register of members and list of contributories, and that of *P.* substituted. *In re* Imperial Mercantile Credit Association. Payne's Case - - - - - 223

3. —— *Power of Directors to refuse to register—Misrepresentation.*] In a company the directors of which had power to refuse to register transfers, a transfer was registered in which the transferee was untruly described, and the consideration untruly stated:—*Held*, that as the directors if they had known the truth ought to have refused to register the transfer, the Court would rectify the register and remove the transferee's name from the list of contributories. Williams' Case - 225, n.

4. —— *Registration—Improper Delay—Rectification of the Register—Companies Act*, 1862, *s.* 35.] *L.* transferred thirty shares in the company to *S.*, and the transfer was left at the office of the company for registration on the 5th of January, at which time three petitions had been presented for winding up; but the winding-up did not actually take place till the 3rd of February, when a previous resolution was confirmed by the company for winding up voluntarily under supervision. The weekly board meeting of the directors took place three days after the transfer was left at the office, but the directors had not registered the transfer when the winding-up commenced, and *L.'s* name was placed on the list of shareholders:—*Held*, that there had been improper delay in registration, and *L.'s* name must be taken off the register.

TRANSFER OF SHARES—*continued.*
In re Hercules Insurance Company. Lowe's Case - - - - - - - 589
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TRUSTEE ACT, 1850, s. 11—Suspending proceedings in bankruptcy — Appointment of new trustee - - - - 233
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TRUSTEE RELIEF ACT—*Costs of Trustees—Income and Corpus.*] Upon a Petition by a tenant for life for payment of the income of a fund paid into Court under the *Trustees Relief Act*, the costs of the trustees are payable out of the income and not out of the *corpus* of the fund. *In re* Smith's Trusts - - - - - - 374

TRUSTEES' COSTS—*Practice—Bankrupt—Trustee.*] A defaulting trustee is entitled to his costs of a suit for the execution of the trusts incurred after his bankruptcy, or after the registration of a creditors' deed executed by him under the *Bankruptcy Act*, 1861. Bowyer *v.* Griffin - 340

ULTRÀ VIRES — Building society — Borrowing money - - - - 605
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—— Gift on attaining twenty-one - - 99
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VOLUNTARY SETTLEMENT—*Consideration of Marriage—Children of future Marriage—Collateral Relatives—Voluntary Gift—Power of Revocation—Setting aside Gift.*] Trusts in a marriage settlement in favour of the children of a future marriage and of collaterals are purely voluntary. —A person taking a benefit under a voluntary gift which is not subject to a power of revocation has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable. —A voluntary gift not subject to a power of revocation, but not meant to be irrevocable, may be set aside by the donor. Wollaston *v.* Tribe 44
2. —— 13 *Eliz. c.* 5—*Subsequent Creditor.*] If at the time of executing a voluntary settlement the settlor is indebted, and in the result any prior creditor is delayed in payment of his debt, then, however solvent the settlor may have been at the time, and, however free from any fraudulent intention the settlement may have been, it may be set aside at the suit of a subsequent creditor. Freeman *v.* Pope - - - - 206
3. —— *Suit to set aside—Subsequent Confirmation.*] Where a settlor filed a bill to obtain the declaration of the Court that a settlement executed by him eleven years previously was not binding upon him by reason of its being an unreasonable one, and of his having executed it in ignorance of its effect:—*Held*, that a subsequent deed executed by the Plaintiff, reciting part of the former deed, and purporting to be in exercise of one of the powers therein contained, was an absolute confirmation of the whole, and was a bar to the Plaintiff's suit, though the deed was one which, apart from lapse of time and subsequent confirmation, the Court could not have upheld. Jarratt *v.* Aldam - - - - 463
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WASTE—*Tenant for Life impeachable for Waste—Owner of first Estate of Inheritance—Timber—Collusive Waste—Bill by Tenant for Life in Possession—Statute of Limitations.*] By its inherent jurisdiction to restrain fraud, the Court of Chancery will, although the Plaintiff may have a legal remedy, interfere to prevent waste being committed by a tenant for life in collusion with the owner of the first estate of inheritance, or by a person who unites both these characters in himself; and as such a suit may be instituted by trustees to preserve contingent remainders during the life of tenant for life in remainder, so may it be instituted by tenant for life in remainder himself.—On the same principle, where waste has been
WASTE—*continued.*
committed by a tenant for life at a time when he was also owner of the first estate of inheritance, and when there was no one capable of bringing an action, a bill to make his estate accountable may, after his death, be brought by a tenant for life in possession.—But, before giving relief in a suit so instituted, the Court must be satisfied that the acts of the deceased tenant for life were such as amounted to collusion between the two characters which he united in himself. Accordingly, when it was shewn that the tenant for life, being also ultimate remainderman in fee, had laid out sums in permanent improvements on the estate at least equal to the value of the amount realized by the acts of waste, which were themselves of trivial amount, the bill was dismissed; and where the executor of a deceased tenant for life, who was also ultimate remainderman in fee, admitted having received the proceeds of certain timber cut or ordered to be cut by his testator, he was allowed, in the account to be taken against him, to take credit for the sums laid out by his testator in permanent improvements.—*Semble*, a claim in equity against the estate of a deceased tenant for life, who was also owner of the first estate of inheritance, for acts of waste committed by him, first arises at the death of such tenant for life, and must be made within six years of that date. Birch-Wolfe *v.* Birch - - - - 683
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—— Withdrawal of Petition - - 382
See Winding-up Petition. 4.

WINDING-UP PETITION — *Company — Allegations.*] The holders of fully paid-up shares in a company presented a Petition praying for the winding up of the company on the ground that its business could not be carried on at a profit. The Petition contained no allegation that the company was insolvent, but evidence was given tending to shew that such was the case:—*Held*, that a creditor appearing in support of the Petition could not claim an order on the ground that the company was insolvent where the Petitioners' case failed. *In re* Spence's Patent Non-conducting Composition and Cement Company - - 9

2. —— *Company—Locus standi of Respondents.*] Where the circumstances require it, the Court will hear in opposition to a petition to wind up a company, persons who are neither creditors nor contributories. Upon a Petition to wind up a canal company, presented by the company, the

WINDING-UP PETITION—*continued.*
corporation of a town within which part of the canal was situated, and a canal company whose canal communicated with that of the petitioning company, were heard in opposition to the Petition. *In re* Bradford Navigation Company - 80

3. —— *Winding-up—Companies Act*, 1862—*Life Assurance Company — Tests of Solvency.*] Inability of a company to pay its debts under sect. 80 of the *Companies Act*, 1862, is an inability to pay debts actually due, for which a creditor could claim immediate payment.—The Court will not order a company to be wound up under the just and equitable clause by reason of any liabilities not immediately payable unless it is reasonably certain that the existing and probable assets will be insufficient to meet the existing liabilities, and will not in any case take into account the possible liabilities or profits which may accrue in respect of future business. *In re* European Life Assurance Society - - - - - 122

4. —— *Company—Tender of Petitioner's Debt and Costs—Right to withdraw Petition.*] A creditor who has presented and advertised a Petition to wind up a company is entitled to withdraw the Petition, and if he brings the Petition to a hearing after an offer to pay his debt and costs, he will not be allowed costs incurred after such offer. *In re* Times Life Assurance and Guarantee Society - - - - - 382

5. —— *Company—Action pending in respect of Petitioner's Debt—Offer by Voluntary Liquidators to be personally answerable for the Amount recovered in the Action—Costs.*] Claimants against an assurance company in respect of a disputed policy brought an action. Shortly before the commencement of the action the company had agreed to sell and transfer their business to another company; and shortly afterwards they went into voluntary liquidation. The claimants then presented a Petition praying for the compulsory winding up of the company. About a month after the presentation of the Petition the voluntary liquidators offered the Petitioners to hold themselves personally liable to pay the Petitioners whatever might be adjudged due to them in the action; and to set aside out of the assets a sum sufficient to meet the claim, if it should be established, with interest and costs.—Petition ordered to stand over till after the trial of the action, the liquidators continuing the undertaking; and Petitioners ordered to pay all the costs of the Petition incurred since the offer. *In re* Imperial Guardian Life Assurance Society - - 447

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